

***United States Court of Appeals
for the Second Circuit***



APPENDIX

**Docket
No. 77-1491**

**In The
United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

- v -

**JAMES W. McGRATH, JON N. ENGLISH and RAYMOND
D. MASCIARELLI,**

Appellants.

**On Appeal From The United States District Court
For The Northern District of New York**

**APPENDIX FOR APPELLEE,
United States of America**

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PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL
CASES (Effective 4/1/73).

APR 12 1973

French

Albany, New York
United States Attorney

PLAN FOR ACHIEVING PROMPT
DISPOSITION OF CRIMINAL CASES

(Approved February 28, 1973; Effective April 1, 1973)

Pursuant to the requirement of Rule 50(b) of the Federal Rules of Criminal Procedure effective October 1, 1972, the judges of the United States District Court for the Northern District of New York have adopted the following plan to minimize undue delay and to further the prompt disposition of criminal cases:

1. *Priorities in Scheduling Criminal Cases.*

Insofar as is practicable:

- (a) the trial of criminal cases shall be given preference over civil cases, as provided by Rule 50(a) Federal Rules of Criminal Procedure; and
- (b) the trial of defendants in custody and defendants whose pre-trial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases. As used in this plan, "custody" means custody on the federal charge contained in the pertinent complaint, information, or indictment.

2. *Review of Defendants in Custody and Delinquent Cases.*

- (a) The United States Attorney and the United States Marshal of this District shall submit to the Chief Judge of the Circuit and the Chief Judge of the District Court reports of defendants in custody

*PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL
CASES (Effective 4/1/73).*

and delinquent cases as prescribed by the Circuit Executive, with approval of the Chief Judge of the Circuit. Copies shall be furnished each District Court Judge and the Circuit Executive.

- (b) At not more than six-month intervals the judges of the court, or a committee thereof, shall review the status of all persons in custody and all cases in which the maximum time limits set forth in Rules 3 and 4 have been exceeded. Cases shall be reassigned as appropriate in order to carry out the purposes of this plan. The United States Attorney shall be informed of any case in which his office appears to be responsible for unnecessary delay.

3. Detained Defendants: Trial Readiness and Effect of Non-Compliance.

In cases where a defendant is detained, the government must be ready for trial within ninety days from the date of detention. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant shall be released upon bond or his own recognizance or upon such other conditions as the district court may determine, unless there is a showing of exceptional circumstances justifying the continued detention of the defendant, and then the detention shall continue only for so long as is necessary. This shall not apply to any defendant who is serving a term of imprisonment for another offense, nor to any defendant who, subsequent to release under this rule, has been charged with another crime or has violated the conditions of his release.

PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL
CASES (Effective 4/1/73).

4. *All Cases: Trial Read and Effect of Non-Compliance.*

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

5. *Excluded Periods.*

In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded:

- (a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions,

*PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL
CASES (Effective 4/1/73).*

interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

- (b) Periods of delay resulting from a continuance granted by the district court at the request of, or with the consent of, the defendant or his counsel, in writing or stated upon the record. The district court shall grant such a continuance only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent.
- (c) The period of time during which:
 - (i) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or
 - (ii) the prosecuting attorney is actively preparing the government's case for trial and additional time is justified by exceptional circumstances of the case.
- (d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

*PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL
CASES (Effective 4/1/73).*

- (e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.
- (f) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.
- (g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.
- (h) Other period of delay occasioned by exceptional circumstances.

6. *Retrials.*

Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause.

7. *Demand and Waiver Provisions.*

A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. However, failure of a defendant to move for discharge prior to plea of guilty or trial shall constitute waiver

**PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL
CASES (Effective 4/1/73).**

of such rights. The preceding sentence shall not apply to a defendant without counsel unless he has notice of these rules.

8. Procedures Intended to Facilitate Prompt Disposition of Cases.

- (a) Pre-trial conferences pursuant to Rule 17.1, Federal Rules of Criminal Procedure, shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the court's criminal docket.
- (b) The court or magistrate at the time of arraignment or at the time of any proceeding preliminary to arraignment shall promptly appoint counsel where appropriate under the Criminal Justice Act and Rule 44 of the Federal Rules of Criminal Procedure. If a defendant appears for arraignment without counsel his arraignment may be postponed not more than one week, except for good cause shown, to permit him to obtain or to consult with counsel. When appropriate the court may cause a plea of not guilty to be entered for the defendant. The court shall take adequate steps to ensure that defendants are represented by counsel.
- (c) A trial date shall be set at the time of pre-trial conference or at the earliest practicable time thereafter.
- (d) If the defendant and his counsel consent thereto, a presentence investigation may be commenced prior to a plea of guilty or nolo contendere or a conviction.
- (e) A defendant shall ordinarily be sentenced within 45 days of the date of his conviction or plea of

**PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL
CASES (Effective 4/1/73).**

guilty or nolo contendere. This specific period, however, may be varied in accordance with the pre sentence report practices and procedures in this district.

9. Responsibility of United States Attorney and Defense Counsel.

- (a) The court has sole responsibility for setting and calling cases for trial. Neither a conflict in schedules of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed setting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as may be necessary to assure prompt disposition of criminal cases. The United States Attorney will familiarize himself with scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce ready for trial.
- (b) If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state, or other institution or that of another jurisdiction, it is his duty promptly:
 - (i) to undertake to obtain the presence of the prisoner for plea and trial; or
 - (ii) when the government is unable to obtain the presence of the defendant, to cause a detainer to be filed with the official having custody of the prisoner and request him to advise the

**PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL
CASES (Effective 4/1/73).**

prisoner of the detainer and to inform the
prisoner of his rights under the Federal Rules
of Criminal Procedure and this plan.

10. *Effective Date of Plan.*

This plan shall become effective upon approval of the
reviewing panel designated in accordance with Rule
50(b) Federal Rules of Criminal Procedure.

THE INTERIM PLAN PURSUANT TO THE PROVISIONS OF THE
SPEEDY TRIAL ACT OF 1974 - P. L. 93-619 (Effective 9/29/75).

RECEIVED

FEB 11 1980

U. S. ATTORNEY
SYRACUSE, N. Y.

THE INTERIM PLAN PURSUANT TO THE
PROVISIONS OF THE SPEEDY TRIAL ACT OF 1974
P.L. 93-619

Pursuant to the requirement of Rule 50(b) of the Federal Rules of Criminal Procedure effective October 1, 1972, and in conformity with the provisions of the Speedy Trial Act of 1974 (Chapter 208, Title 18, U.S.C.), and the Federal Juvenile Delinquency Act as amended (18 U.S.C. §§5035, 5037), the judges of the United States District Court for the Northern District of New York have adopted the following plan to minimize undue delay and to further the prompt disposition of criminal cases:

1. *Priorities in Scheduling Criminal Cases*

Insofar as is practicable:

(a) The trial of criminal cases shall be given preference over civil cases, as provided by Rule 50(a) Federal Rules of Criminal Procedure; and

(b) The trial of defendants in custody and high risk defendants should be given preference over other criminal cases. As used in this plan, "custody" means custody on the Federal charge contained in the pertinent complaint, information, or indictment. As used in this plan, a "high risk defendant" means a defendant not in custody.

(i) whose chances of appearing at his trial or other court proceedings have been judicially determined to be poor; or,

**THE INTERIM PLAN PURSUANT TO THE PROVISIONS OF THE
SPEEDY TRIAL ACT OF 1974 P. L. 93-619 (Effective 9/29/75).**

- (ii) reasonably designated by the United States Attorney as posing a danger to himself or any other person, or to the community.

2. Review of Defendants in Custody and Delinquent Cases

(a) The United States Attorney of this District shall submit to the Chief Judge of the Circuit and the Chief Judge of the District Court reports of defendants in custody, high risk defendants, and delinquent cases as prescribed by the Circuit Executive, with approval of the Chief Judge of the Circuit. Copies shall be furnished each District Court Judge and the Circuit Executive. In addition to monthly case reports (Form 74 and 74A), these reports shall include a biweekly report on revised Form 73 of all persons in custody awaiting action in this district, including juveniles, and all high risk defendants, which shall set forth the date on which the time for trial of each defendant begins to run and which shall report any action taken during the reporting period pursuant to paragraphs 4 or 11 for non-compliance with the time requirements for commencing trial.

(b) At not more than six-month intervals the judges of the court, or a committee thereof, shall review the status of all persons in custody and all cases in which the maximum time limits set forth in Rules 3 and 5 have been exceeded. Cases shall be reassigned as appropriate in order to carry out the purposes of this plan. The United States Attorney shall be informed of any case in which his office appears to be responsible for unnecessary delay.

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SPEEDY TRIAL ACT OF 1974 P. L. 93-619 (Effective 9/29/75).*

3. Time Requirements for Trial of Defendants in Custody and of High Risk Defendants

(a)(1) Trial of a defendant held in custody solely for the purpose of trial shall commence within 90 days following the beginning of continuous custody.

(2) Trial of a high risk defendant shall commence within ninety days of the determination or designation as "high risk", or within ninety days of the effective date of this plan, whichever date is later.

(b)(1) Where a defendant is apprehended outside this district and held in custody and his case is initially processed under Rule 20 of the Federal Rules of Criminal Procedure, the times set out above shall begin to run where the defendant rejects disposition under Rule 20.

(2) Where a defendant is apprehended outside this district and is held in custody (except for cases initially processed under Rule 20), the times set out above shall begin to run:

(i) Upon the beginning of the defendant's continuous custody, if the arrest was pursuant to a warrant issued on an indictment or information filed in this district;

(ii) Upon the finding and recommendation or order by a magistrate that a warrant of removal shall issue, if the defendant's arrest was not pursuant to such a warrant.

(3) Where a defendant is apprehended outside this district and is released pursuant to the provisions of

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SPEEDY TRIAL ACT OF 1974 - P. L. 93-619 (Effective 9/29/75).

Chapter 207, Title 18, U.S.C., the times set out above shall begin to run when the defendant returns to this district.

4. *Effect of Non-Compliance*

(a) Upon the expiration of the time limits prescribed by Section 3:

(1) A defendant in custody solely because he is awaiting trial and whose trial has failed to commence through no fault of the accused or his attorney shall be released subject to such conditions as the court may impose in accordance with 18 U.S.C. 3146.

(2) A high risk defendant whose trial has failed to commence through no fault of the attorney for the government shall have his release conditions automatically reviewed by the court. A high risk defendant who is found by the court at that time to have intentionally delayed the trial of his case shall be subject to an order of this court modifying his non-financial conditions of release under Chapter 207, Title 18, U.S.C., to insure that he shall appear at trial as required.

5. *All Cases: Trial Readiness and Effect of Non-Compliance*

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial

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within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 6, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

6 Excluded Periods

In computing the time within which the government should be ready for trial under Rule 5, the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

(b) Periods of delay resulting from a continuance granted by the District Court at the request of, or with the consent of, the defendant or his counsel, in writing or stated upon the record. The District Court shall grant such a continuance only if it is satisfied

*THE INTERIM PLAN PURSUANT TO THE PROVISIONS OF THE
SPEEDY TRIAL ACT OF 1974 - P. L. 93-619 (Effective 9/29/75).*

that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent.

(c) The period of time during which:

- (i) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or
- (ii) the prosecuting attorney is actively preparing the government's case for trial and additional time is justified by exceptional circumstances of the case.

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

*THE INTERIM PLAN PURSUANT TO THE PROVISIONS OF THE
SPEEDY TRIAL ACT OF 1974 - P L. 93-619 (Effective 9/29/75).*

(f) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

(g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(h) Other period of delay occasioned by exceptional circumstances.

7. Retrials

Where a new trial has been ordered by the District Court or a trial or new trial has been ordered by an Appellate Court, it shall commence at the earliest practicable time, but in any event, not later than 60 days after the finality of such order. If the defendant is to be retried following an appeal or collateral attack, the court trying the case may extend such period for a total not to exceed 180 days from the date on which the order occasioning the retrial becomes final, where unavailability of witnesses or other factors resulting from passage of time shall make trial within 60 days impractical.

8. Demand and Waiver Provisions

A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. However, failure of a defendant to move for discharge

*THE INTERIM PLAN PURSUANT TO THE PROVISIONS OF THE
SPEEDY TRIAL ACT OF 1974 — P. L. 93-619 (Effective 9/29/75).*

prior to plea of guilty or trial shall constitute waiver of such rights. The preceding sentence shall not apply to a defendant without counsel unless he has notice of these rules.

9. Procedures Intended to Facilitate Prompt Disposition of Cases

(a) Pre-trial conferences pursuant to Rule 17.1, Federal Rules of Criminal Procedure, shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the court's criminal docket.

(b) The court or magistrate at the time of arraignment or at the time of any proceeding preliminary to arraignment shall promptly appoint counsel where appropriate under the Criminal Justice Act and Rule 4 of the Federal Rules of Criminal Procedure. If a defendant appears for arraignment without counsel his arraignment may be postponed not more than one week, except for good cause shown, to permit him to obtain or to consult with counsel. When appropriate the court may cause a plea of not guilty to be entered for the defendant. The court shall take adequate steps to ensure that defendants are represented by counsel.

(c) A trial date shall be set at the time of pre-trial conference or at the earliest practicable time thereafter.

(d) If the defendant and his counsel consent thereto, a presentence investigation may be commenced prior to a plea of guilty or nolo contendere or a conviction.

THE INTERIM PLAN PURSUANT TO THE PROVISIONS OF THE
SPEEDY TRIAL ACT OF 1974 — P. L. 93-619 (Effective 9/29/75).

(e) A defendant shall ordinarily be sentenced within 45 days of the date of his conviction or plea of guilty or nolo contendere. This specific period, however, may be varied in accordance with the presentence report practices and procedures in this District.

10. *Responsibility of United States Attorney and Defense Counsel*

(a) The court has sole responsibility for setting and calling cases for trial. Neither a conflict in schedule of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed setting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as may be necessary to assure prompt disposition of criminal cases. The United States Attorney will familiarize himself with scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce it is ready for trial.

(b) If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state, or other institution or that of another jurisdiction, it is his duty promptly:

- (i) to undertake to obtain the presence of the prisoner for plea and trial; or
- (ii) when the government is unable to obtain the presence of the defendant, to cause a detainer

THE INTERIM PLAN PURSUANT TO THE PROVISIONS OF THE
SPEEDY TRIAL ACT OF 1974 - P. L. 93-619 (Effective 9/29/75).

to be filed with the official having custody of the prisoner and request him to advise the prisoner of the detainer and to inform the prisoner of his rights under the Federal Rules of Criminal Procedure and this plan.

(c) If a defendant is being held in custody awaiting trial, the United States Attorney shall be responsible for advising the court at the earliest practicable time of the date of the beginning of custody.

(d) It is the responsibility of the United States Attorney to advise the court at the earliest practicable time (usually at the hearing with respect to bail) that the defendant is considered a high risk defendant.

11. *Juvenile Proceedings*

(a) An alleged delinquent who is in detention pending trial shall be brought to trial within 30 days of the date upon which such detention was begun.

Upon the expiration of such time limit, on the motion of the alleged delinquent or at the direction of the court, the case shall be dismissed, unless the Attorney General shows that additional delay was caused by the juvenile or his counsel or was consented to by the juvenile and his counsel, or would be in the interest of justice in the particular case. Delays attributable solely to court calendar congestion may not be considered in the interest of justice. Except in extraordinary circumstances, an information dismissed under this provision may not be reinstituted.

*THE INTERIM PLAN PURSUANT TO THE PROVISIONS OF THE
SPEEDY TRIAL ACT OF 1974 — P. L. 93-619 (Effective 9/29/75).*

(b) If a juvenile is adjudicated delinquent, a separate dispositional hearing shall be held no later than 20 court days after trial, unless the court has ordered further study of the juvenile in accordance with 18 U.S.C. §5037(c).

12. This plan shall become effective on September 29, 1975.

PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES
(Effective 7/1/76).

RECEIVED

SEP 1 1976

U. S. ATTORNEY
SYRACUSE, N. Y.

**Plan for prompt
disposition of
criminal cases**

Pursuant to Speedy Trial Act of 1974
— 18 U.S.C. § 3161-74

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES
(Effective 7/1/76).

**STATEMENT OF TIME LIMITS AND PROCEDURES
FOR ACHIEVING PROMPT DISPOSITION
OF CRIMINAL CASES**

Pursuant to the requirements of rule 50(b) of the Federal Rules of Criminal Procedure, the Speedy Trial Act of 1974 (18 U.S.C. Chapter 208), and the Federal Juvenile Delinquency Act (19 U.S.C. §§5036, 5037), the judges of the United States District Court for the Northern District of New York have adopted the following time limits and procedures to minimize undue delay and to further the prompt disposition of criminal cases and certain juvenile proceedings:

1. *Applicability*

(a) *Offenses.* The time limits set forth herein are applicable to all criminal offenses triable in this court, including cases triable by United States magistrates, except for petty offenses as defined in 18 U.S.C. §1(3). Except as specifically provided, they are not applicable to proceedings under the Federal Juvenile Delinquency Act.

(b) *Persons.* The time limits are applicable to persons accused who have not been indicted or informed against as well as those who have, and the word "defendant" includes such persons unless the context indicates otherwise.

2. *Priorities in Scheduling Criminal Cases*

Preference shall be given to criminal proceedings as far as practicable as required by rule 50(a) of the Federal Rules of Criminal Procedure. The trial of defendants in custody solely because they are awaiting trial and of high-risk defendants as defined in section 6 should be given preference over other criminal cases.

3. *Time Within Which an Indictment or Information Must be Filed.*

(a) *Time Limits.* If an individual is arrested or served with a summons and the complaint charges an offense to be prosecuted in this district, any indictment or information subsequently filed in connection with such charge shall be filed within the following time limits:

PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES
(Effective 7/1/76).

(1) If the arrest or service occurs before July 1, 1976, within 60 days of July 1, 1976;

(2) If the arrest or service occurs on or after July 1, 1976, but before July 1, 1977, within 60 days of arrest or service;

(3) If the arrest or service occurs on or after July 1, 1977, but before July 1, 1978, within 45 days of arrest or service;

(4) If the arrest or service occurs on or after July 1, 1978, but before July 1, 1979, within 35 days of arrest or service.

(b) *Grand Jury Not in Session.* If the defendant is charged with a felony to be prosecuted in this district, and no grand jury in the district has been in session during the period prescribed in subsection (a), such period shall be extended an additional 30 days.

(c) *Measurement of Time Periods.* If a person has not been arrested or served with a summons on a Federal charge, an arrest will be deemed to have been made at such time as the person (i) is held in custody solely for the purpose of responding to a Federal charge; (ii) is delivered to the custody of a Federal official in connection with a Federal charge; or (iii) appears before a judicial officer in connection with a Federal charge.

(d) *Related Procedures*

(1) At the time of the initial appearance before a judicial officer of a person who has been arrested for an offense not charged in an indictment or information, the judicial officer shall establish for the record the date on which the arrest took place.

(2) In the absence of a showing to the contrary, a summons shall be considered to have been served on the date of Service shown on the return thereof.

4. *Time Within Which Arraignment Must Be Held*

(a) *Time Limits.* A defendant shall be arraigned within 10 days of the last to occur of the following dates:

(1) The date on which an indictment or information is filed;

PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES
(Effective 7/1/76).

- (2) The date on which a sealed indictment or information is unsealed;
- (3) The date of the defendant's initial appearance before a judicial officer of this district; or
- (4) July 1, 1976.

(b) *Measurement of Time Periods.* For the purposes of this section:

- (1) A defendant who signs a written consent to be tried before a magistrate shall, if no indictment or information charging the offense has been filed, be deemed indicted on the date of such consent.
- (2) An arraignment shall be considered to take place at the time a plea is taken or is entered by the court on the defendant's behalf.

(c) *Related Procedures.* At the time of the defendant's initial appearance before a judicial officer of this district the officer will take appropriate steps to assure that the defendant is represented by counsel and shall appoint counsel where appropriate under the Criminal Justice Act and Rule 44 of the Federal Rules of Criminal Procedure. The judicial officer shall inform the defendant of his rights under this Plan and pertinent legislation.

5. *Time Within Which Trial Must Commence*

(a) *Time Limits.* The trial of a defendant shall commence within the following time limits:

- (1) If the arraignment occurs before July 1, 1976, within 180 days of July 1, 1976;
- (2) If the arraignment occurs on or after July 1, 1976, but before July 1, 1977, within 180 days of the arraignment;
- (3) If the arraignment occurs on or after July 1, 1977, but before July 1, 1978, within 120 days of the arraignment;
- (4) If the arraignment occurs on or after July 1, 1978, but before July 1, 1979, within 80 days of the arraignment.

(b) *Retrial.* The retrial of a defendant shall commence

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within 60 days from the date the order occasioning the retrial becomes final. If the retrial follows an appeal or collateral attack, the court may extend the period if unavailability of witnesses or other factors resulting from passage of time make trial within 60 days impractical. The extended period shall not exceed 180 days.

(c) *Withdrawal of Plea.* If a defendant enters a plea of guilty or nolo contendere to any or all charges in an indictment or information and is subsequently permitted to withdraw it, the arraignment with respect to the entire indictment or information shall be deemed to have been held on the day the order permitting withdrawal of the plea becomes final.

(d) *Superseding charges.* If, after an indictment or information has been filed, a complaint, indictment, or information is filed which charges the defendant with the same offense, or with an offense required to be joined with that offense, the time limit applicable to the subsequent charge will be determined as follows:

(1) If the original indictment or information was dismissed on motion of the defendant before the filing of the subsequent charge, the time limit shall be determined without regard to the existence of the original charge.

(2) If the original indictment or information is pending at the time the subsequent charge is filed, the trial shall commence within the time limit for commencement of trial on the original indictment or information.

(3) If the original indictment or information was dismissed on motion of the United States Attorney before the filing of the subsequent charge, the trial shall commence within the time limit for commencement of trial on the original indictment or information, but the period during which the defendant was not under charges shall be excluded from the computations. Such period is the period between the dismissal of the original indictment or information and the date the time would have commenced to run on the subsequent charge had there been no previous charge.

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(4) In cases in which paragraph (2) or (3) applies but no arraignment is held on the original indictment of information, the time limit for commencement of trial shall be computed as if such arraignment had been held on the last permissible day, determined under section 4(2).

(5) The time within which an indictment or information must be obtained on the subsequent charge, or within which an arraignment must be held on such charge, shall be determined without regard to the existence of the original indictment or information.

(e) *Measurement of Time Periods.* For the purposes of this section:

(1) An arraignment shall be deemed to take place as provided in section 4(b)(2).

(2) A trial in a jury case shall be deemed to commence at the beginning of voir dire.

(3) A trial in a non-jury case shall be deemed to commence on the day the case is called, provided that some step in the trial procedure immediately follows.

(f) *Related Procedures.*

(1) The court shall have sole responsibility for setting cases for trial after consultation with counsel. At the time of arraignment or as soon thereafter as is practicable, each case will be set for trial at a designated session. For defendants subject to section 6(a)(1) or 6(a)(2), it is recommended that the trial be set for not more than 75 days after the beginning of continuous detention or the designation as high risk.

(2) Neither a conflict in schedule of Assistant United States Attorney's nor a conflict in schedules of defense counsel will be grounds for a continuance or delayed setting except under unusual circumstances approved by the Court and called to the Court's attention at the earliest practicable time.

(3) In the event that a complaint, indictment, or information is filed against a defendant charged in a

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pending indictment or information or in an indictment or information dismissed on motion of the United States Attorney, the trial on the new charge shall commence within the time limit for commencement of trial on the original indictment or information unless the court finds that the new charge is not for the same offense charged in the original indictment or information or an offense required to be joined therewith.

(4) At the time of the filing of a complaint, indictment, or information described in paragraph (3), the United States Attorney shall give written notice to the court if the new charge is not for the same offense charged in the original indictment or information or an offense required to be joined therewith.

(5) All pretrial hearings shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the court's criminal docket.

6. Defendants in Custody and High-Risk Defendants

(a) *Time Limits.* Notwithstanding any longer time periods that may be permitted under section 3, 4 and 5, the following time limits will also be applicable to defendants in custody and high-risk defendants as herein defined:

(1) The trial of a defendant held in custody solely for the purpose of trial on a Federal charge shall commence within 90 days following the beginning of continuous custody.

(2) The trial of a high-risk defendant shall commence within 90 days of the determination or designation as high-risk.

(b) *Definition of "High-Risk Defendant."* A high-risk defendant is:

(1) One whose chances of appearing at his trial or other court proceedings have been judicially determined to be poor; or

(2) One reasonably designated by the United States Attorney as posing a danger to himself or any other person or to the community.

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(c) *Measurement of Time Periods.* For the purposes of this section:

(1) When a defendant is apprehended and held in custody outside this district, custody for the sole purpose of trial shall be deemed to begin (i) in proceedings under Rule 40(b) of the Federal Rules of Criminal Procedure, upon the finding and recommendation or order by the magistrate or judge that a warrant of removal shall issue or upon the defendant's arrest pursuant to a warrant issued on an indictment or information filed in this district, and (ii) in cases initially processed under Rule 20, at such time as the defendant rejects disposition under Rule 20.

(2) When a defendant is apprehended outside this district and is released pursuant to the provisions of Chapter 207 of title 18, U.S.C., the times set out above shall begin to run when the defendant returns to this district.

(3) A trial shall be deemed to commence as provided in sections 5(e)(2) and 5(e)(3).

(d) *Related Procedures.*

(1) If a defendant is being held in custody solely for the purpose of awaiting trial, the United States Attorney shall advise clerk of the court at the earliest practicable time of the date of beginning of such custody.

(2) The United States Attorney shall advise the court and the Clerk at the earliest practicable time (usually at the hearing with respect to bail) if the defendant is considered by him to be high risk.

(3) If the court finds that the filing of a "high risk" designation as a public record may result in prejudice to the defendant, it may order the designation sealed for such period as is necessary to protect the defendant's right to a fair trial, but not beyond the time that the court's judgment in the case becomes final. During the time the designation is under seal, it shall be made known to the defendant and his counsel but shall not be made known to other persons without the permission of the court.

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7. Time within Which Government Must be Ready For Trial

Notwithstanding any other time periods which may be permitted or required under Sections 3, 4 and 5, the government must be ready for trial according to the shorter of the following time limits:

(a) Time limits measured from the date on which the defendant is arrested or served with a summons. The government must be ready for trial within the following time limits

(1) If the arrest or service of summons occurs before July 1, 1977, within 180 days of the arrest or service of summons;

(2) If the arrest or service of summons occurs on or after July 1, 1977, but before July 1, 1978, within 175 days of the arrest or service of summons;

(3) If the arrest or service of summons occurs on or after July 1, 1978, but before July 1, 1979, within 125 days of the arrest or service of summons.

(b) Time limits measured from the date on which an indictment or information is filed. The government must be ready for trial within the following time limits:

(1) If the indictment or information is filed before July 1, 1977, within 180 days of the filing of the indictment or information.

(2) If the indictment or information is filed on or after July 1, 1977, but before July 1, 1978, within 130 days of the filing of the indictment or information;

(3) If the indictment or information is filed on or after July 1, 1978, but before July 1, 1979 within 90 days of the filing of the indictment or information.

(c) *Sealed Indictment.* For purposes of this section, a sealed indictment shall be considered to be filed on the date on which it is unsealed.

8. Time Within Which Defendant Should Be Sentenced

(a) *Time Limit.* A defendant shall ordinarily be sentenced within 45 days of the date of his conviction or plea of guilty or nolo contendere. This specific period, however,

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may be varied in accordance with the presentence report practices and procedures in this District.

(b) *Related Procedures.* If the defendant and his counsel consent thereto, a presentence investigation may be commenced prior to a plea of guilty or nolo contendere or a conviction.

9. Juvenile Proceedings

(a) *Time Within Which Trial Must Commence.* An alleged delinquent who is in detention pending trial shall be brought to trial within 30 days of the date on which such detention was begun, as provided in 18 U.S.C. §5036.

(b) *Time of Dispositional Hearing.* If a juvenile is adjudicated delinquent, a separate dispositional hearing shall be held no later than 20 court days after trial, unless the court has ordered further study of the juvenile in accordance with 18 U.S.C. §5037(c).

10. Exclusion of Time From Computations

(a) *Applicability.* In computing any time limit under section 3, 4, 5, 6, or 7, the periods of delay set forth in 18 U.S.C. §3161(h) shall be excluded.

(b) *Records of Excludable Time.* The clerk of the court shall enter on the docket, in the form prescribed by the Administrative Office of the United States Courts, information with respect to excludable periods of time for each criminal defendant for administrative purposes only except as provided in this section or on order of the court. With respect to proceedings prior to the filing of an indictment or information, excludable time shall be reported to the clerk by the United States Attorney at the time of filing.

(c) *Stipulations.*

(1) The attorney for the government and the attorney for the defendant may at any time enter into stipulations with respect to the accuracy of the docket entries recording excludable time.

(2) If the amount of time stipulated by the parties does not exceed the amount recorded on the docket for any excludable period of delay, the stipulation shall be

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conclusive as between the parties unless it has no basis in fact or law. It shall similarly be conclusive as to a codefendant for the limited purpose of determining, under 18 U.S.C. §3161(h)(7), whether time has run against the defendant entering into the stipulation.

(3) To the extent that the amount of time stipulated exceeds the amount recorded on the docket, the stipulation shall have no effect unless approved by the court.

(d) Pre-Indictment Procedures.

(1) Except for time excludable under 18 U.S.C. §3161(h)(8), the court will not rule on the excludability of time in computing the time within which an indictment or information must be filed.

(2) In the event that the United States Attorney seeks a continuance under 18 U.S.C. §3161(h)(8), he shall file a written motion with the court. The motion shall state (i) whether or not the defendant is being held in custody on the basis of the complaint, (ii) the period of time proposed for exclusion, and (iii) the basis of the proposed exclusion. In appropriate circumstances, it may include a request that some or all of the supporting material be considered *ex parte* and *in camera*.

(3) The court may grant a continuance under 18 U.S.C. §3161(h)(8) for either a specific period of time or a period to be determined by reference to an event (such as recovery from illness) not within the control of the government. If the continuance is to a date not certain, the court shall require one or both parties to inform the court promptly when and if the circumstances that justify the continuance no longer exist. In addition, the court shall require one or both parties to file periodic reports bearing on the continued existence of such circumstances. The court shall determine the frequency of such reports in the light of the facts of the particular case.

(e) Post-Indictment Procedures.

(1) In the event that the court continues an arraignment or trial beyond the time limit set forth in section

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4 or 5, the court shall determine whether the limit may be recomputed by excluding time pursuant to 18 U.S.C. §3161(h). In the absence of a need for a continuance, the court will not ordinarily rule on the excludability of any period of time.

(2) If it is determined that a continuance is justified, the court shall set forth its findings in the record, either orally or in writing. If the continuance is granted under 18 U.S.C. §3161(h)(8), the court shall also set forth its reasons for finding that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial. If the continuance is to a date not certain, the court shall require one or both parties to inform the court promptly when and if the circumstances that justify the continuance no longer exist. In addition, the court shall require one or both parties to file periodic reports bearing on the continued existence of such circumstances. The court shall determine the frequency of such reports in the light of the facts of the particular case.

11. *Sanctions*

(a) *Defendants in Custody.* A defendant in custody solely for trial whose trial has not commenced within the time limit set forth in 18 U.S.C. §3164(b) shall, if the failure to commence trial was through no fault of the defendant or his counsel, be released subject to such conditions as the court may impose in accordance with 18 U.S.C. §3164. Nothing herein shall require that a defendant in custody be released except as required by 18 U.S.C. §3164(c).

(b) *High-Risk Defendants.* A high-risk defendant whose trial has not commenced within the time limit set forth in 18 U.S.C. §3164(b) shall, if the failure to commence trial was through no fault of the attorney for the Government, have his release conditions automatically reviewed. A high-risk defendant who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under chapter 207 of title 18, U.S.C., to ensure that he shall appear at trial as required.

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(c) *Government Not Ready for Trial Within Six Months.*

If the government is not ready for trial within the time prescribed by section 7(a) and 7(b), and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with the utmost promptness. The court's order dismissing the indictment shall be with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this paragraph.

(d) *Alleged Juvenile Delinquents.* An alleged delinquent in custody whose trial has not commenced within the time limit set forth in 18 U.S.C. §5036 shall be entitled to dismissal of his case pursuant to that section unless the Attorney General shows that the delay was consented to or caused by the juvenile or his counsel, or would be in the interest of justice in the particular case.

(e) *Dismissal Not Required.* Except as required by paragraph (c) of this section and by 18 U.S.C. §5036, failure to comply with the time limits prescribed herein shall not require dismissal of the prosecution. The court retains the power to dismiss a case for unnecessary delay pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure.

12. *Persons Serving Terms of Imprisonment*

If the United States Attorney knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly seek to obtain the presence of the prisoner for trial, or cause a detainer to be filed, in accordance with the provisions of 18 U.S.C. §3161(j).

13. *Monitoring Compliance With Time Limits*

(a) *Responsibilities of District Planning Group.* As part of its continuing study of the administration of criminal justice in this district, the district planning group will pay

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special attention to those cases in which there is a failure to comply with the time limits set forth therein. From time to time, the group may make appropriate recommendations to prevent repetition of failure.

(b) *Responsibilities of Clerk.* In addition to maintaining such statistical data as required by the Administrative Office of the United States Courts, the clerk will report monthly to the District planning group and to the Judicial Council of the Second Circuit on forms as prescribed by the Judicial Council of the Second Circuit, each case in which there is a failure to comply with any time limits set forth therein. In addition, the Clerk shall have the responsibility of establishing a case monitoring system.

(c) *Responsibilities of United States Attorney.* The United States Attorney shall, within 5 days after the close of the reporting period, furnish the court with a bi-weekly report of all persons in custody and note thereon those defendants whose custody will extend beyond the time limit specified in Section 6(a)(1) before the filing of the next bi-weekly report. The Marshal shall provide such assistance as may be necessary in the preparation of the report. The report shall indicate the judge to whom each case has been assigned. The "Reason for Detention" column shall include an explanation in any case for which the defendant's status appears to be inconsistent with the time limits set forth in sections 3(a), 4(a), 5(a), or 6(a). A copy of the report shall be furnished to each judge of the court and to the Judicial Council of the Second Circuit.

14. *Effective Date*

Upon approval of the reviewing panel designated in accordance with 18 U.S.C. §3165(c) and Rule 50(b) of the Federal Rules of Criminal Procedure, the time limits and procedures set forth herein shall become effective on July 1, 1976, and shall supersede those previously in effect.

TRANSCRIPT OF HEARING Held March 4, 1975.

to be filed with his Honor, and copies to the Counsel, at least that from that date none of the delay in time be attributable to the Defense.

THE COURT: What is your computation? You are building up to have this dismissed?

MR. SCACCIA: I certainly am. I have made no secret on it previously.

THE COURT: You should be careful. Judge Port knows all about this and he knows more than I will ever know about it. I think it should be brought on before Judge Port, and he has a motion day next week, and put all of these cases on for him to decide whether they should be tried promptly, and what disposition he wants made, because it is up to him to find out this time computation.

Mr. Welch will be able to go in, in Syracuse. He is there and working.

So, March 10th, on the Judge's motion calendar, put these cases on to hear Mr. Scaccia tell what he just told me.

MR. SCACCIA: I think that that is very equitable.

Is there some way that we can have coordination? The United States Attorney claims that

TRANSCRIPT OF HEARING Held May 8, 1975.

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office. I made a note of the time being 4:48 yesterday afternoon and letting the 'phone ring for twelve rings, so Mr. Desisti was not contacted by telephone.

Mr. Allio, who represents the defendants Santacrose and Christina, I was able to contact him at his home and he indicated that he could not make it here this morning, and he also said that he could not oppose the motion, for whatever reason I don't know, but that is what he said to me.

I contacted the office of Mr. Dante Scaccia at 4:50 p.m. yesterday afternoon and was told Mr. Scaccia had left for Albany, New York, and would not be in contact with the office until after his return from Albany, and he was going to Albany today. However, at 5:20 last night, Mr. Scaccia did call me back, indicated they were able to get through to him. I advised what we were seeking and he advised me he had no objection to a reasonable stay. I said, "I don't know what you mean by a reasonable stay, but what we are seeking is a stay of the trial until 15 days after the final ruling from the Court of Appeals."

Mr. Scaccia said, "I still have no objection and you can quote me to the court."

That, Your Honor, is all I have to say in regard to the notice I have sent to each one of these

TRANSCRIPT OF HEARING Held March 2, 1976.

THE CLERK: The United States of America versus Frank S. Cannone, Stanley A. Rappuci, Thomas A. Gaetani, Jon N. English, Joseph N. Maruca, Vincent N. Christina, Raymond D. Masciarelli, James W. McGrath, Andrew J. Quinlan and Thomas J. Abbadessa, 74-CR-142 and 74-CR-144.

MR. SCACCIA: Your Honor, we respectfully ask these cases be marked over to the Syracuse term.

MR. DREYER: Your Honor, these are Mr. Chalenski's cases, and he has no objection to them being marked over.

THE COURT: What is JMS, Jr.? Who is that?

MR. DREYER: : That will also be Mr. Chalenski's case. That is an error.

THE COURT: Are all these cases to be tried together?

MR. SCACCIA: That is what I was going to mention. Judge Port last year severed count three of Indictment 74-CR-142, so the upshot is that there are actually three sets of cases, two from 74-CR-142 because of the severance of count three which involves only the defendants, Maruca and Christina, and 75-CR-144 then becomes three, so there are really

three sets of cases, but they are all companion.

THE COURT: You say that Mr. Chalenski has no objection to marking these over?

MR. DREYER: That's correct, Your Honor.

THE COURT: I think they should be marked over to Auburn.

MR. DREYER: I think Mr. Scaccia meant Auburn.

MR. SCACCIA: I asked for Syracuse.

THE COURT: No, Auburn is in May, and Judge Port is now taking senior status. He won't be back until mid-April, and he should be fit and ready to start in May in Auburn and try all the cases you have up there. So I will mark the case over to Auburn and the time will be excluded, because I assume that all the attorneys are agreed that is where these cases should be tried.

MR. SCACCIA: I think that is correct, Judge.

THE COURT: All right.

MR. SCACCIA: Thank you, Judge.

Does that also apply to 74-CR-144?

MR. DREYER: That's correct.

THE COURT: Yes, that will apply to

all of them.

MR. SCACCIA: All right.

CERTIFICATION

I, George T. McGloine, Official Court Reporter for the United States District Court in and for the Northern District of New York, do certify this to be a true and accurate transcript of the stenographic record of the foregoing, taken at the time and place noted in the heading hereof.

George T. McGloine
Official Court Reporter
United States District Court
Northern District of New York

Albany, New York

July 5, 1979

TRANSCRIPT OF HEARING Held September 20, 1976.

THE COURT: Call the case.

THE CLERK: United States of America
versus Frank S. Cannone, 74-CR-142.

MR. CHALINSKI: Ready for the Government.

THE COURT: What about the Defendants?

MR. AVERY: I am here representing Mr.
English, and apparently we are ready. I understand that
Mr. Scaccia, representing Raymond Masciarelli and James
McGrath has reported to the Clerk that he is recovering
from surgery and is not available.

I understand Mr. Boreanaz, representing
Mr. Cannone, is engaged in the murder trial in Rochester,
and Mr. DeSisti is here representing Mr. Quinlan, and I
believe that there is a motion presented on that matter
for severance.

THE COURT: I am not familiar with any
motion for a severance on the part of them. However, I
am aware of Mr. Scaccia's hospitalization, by letter, and
a copy of a letter to the Clerk.

Also, I am aware or I have been informed
that Mr. Boreanaz is presently engaged in a murder trial
in Rochester, I believe. Now, the length of that murder
trial seems to be in question.

The Clerk advises me that there is a likeli-
hood that it will go for as long as six weeks.

TRANSCRIPT OF HEARING Held September 20, 1976.

Under the circumstances the Court feels that a continuance is required here and I am going to grant a continuance in all of the cases in which Mr. Boreanaz is an attorney, and these cases, I understand, are all associated, and without date, subject to being placed back on the calendar by the Clerk, on relevantly short notice, possibly as short as a day.

Now, the short notice, of course, militates against the prosecution, and they have to go forward in the initial instance, and while they are going forward, any incidental preparations that can be accomplished by the Defendants can be done.

Under the circumstances I find that the ends of justice are served by a continuance, which I have just granted and that they outweigh the best interests of the public and the Defendants in a speedy trial.

I think that it would be unfair in a case of this nature, with the scope of the discovery that has already been accomplished, of the extent of the wire taps with which I am familiar, to insist on the Defendants getting new counsel at this stage of the proceedings. I think that simple justice and the necessity of preventing a miscarriage of justice requires this continuance.

I am directing Mr. Boreanaz to advise the Clerk immediately on the disposition of the case on which

he is presently engaged, and the Clerk is to arrange to place this case and the other cases in which Mr. Boreanaz is counsel on for trial as rapidly as possible thereafter.

Go ahead.

THE CLERK: United States of America versus Vincent M. Christiana, 74-CR-142.

THE COURT: Same disposition is made in this case for the same reasons.

MR. CHALINSKI: Thank you, Your Honor.

THE CLERK: United States of America versus Frank Cannone, 75-CR-123.

MR. FISHER: The Government is ready.

THE COURT: Same disposition as made in that case.

THE CLERK: United States of America versus Remo Allio, 76-CR-8, and 76-CR-1.

MR. FISHER: The Government is ready.

THE COURT: Same disposition for the same reasons as made in that case, and Mr. Boreanaz and Government counsel can expect to spent a considerable amount of time in trying these cases, back to back.

MR. FISHER: We will, Your Honor.

THE CLERK: United States of America versus Anthony Moscow, 76-CR-60.

THE COURT: Same disposition.

claims that there will be voice identification of defendant English on transcripts involving more than one day; that there will be voice identification on three days of those which were originally furnished to me, as possibly containing the defendant English.

I need -- my motion today is for a continuance for the reason of surprise, and prejudice at this point.

The defendant will need additional time to assess this new form, and at the same time I have other reasons and other requests for a continuance, reasons to support my request for a continuance and these are among other things that we have never yet been furnished, defendant English has never yet been furnished with any report of an expert concerning the matters of the scope of the business, which is alleged to have been conducted, the nature of the parties involved, this expert opinion-kind of report, which we had been furnished originally.

Now, I might say that we had been furnished originally with expert opinion reports under Rule 16 by an expert who had,

TRANSCRIPT OF HEARING Held November 17, 1976.

at that time, been the government's expert, but we have been informed by the Government that this expert has retired, and that new expert has analyzed all of the tape information for the purpose of testimony in this case, and defendant English feels that, at this time, since we have not been furnished with this report, that a continuance is in order for the purpose of being allowed to move for an order directing that the Government be made to furnish a report similar in nature to that which has been previously furnished under Rule 16, and the request for a continuing disclosure.

THE COURT: All right, Mr. Scaccia.

MR. SCACCIA: If it please the

Court: I join in counsel's motion of, number one, I think the Court should fortify and confirm the accuracy of Mr. Avery's statements and comments, particularly with respect to the event in which I was a party with him at the occasion of the listening of the tapes, as against the transcripts that were furnished.

Moreover, I haven't had a chance to compare my bill of particulars dated May 5th,

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1976, with that of Mr. Avery on this particular line, but in Paragraph 2 of the Government's bill of particulars, Your Honor, the Government indicates that it is furnishing to the defendant Mascarelli, all of the statements made by him and to go on verbatim, a copy of that portion of the transcript which contains statements of said defendant has been provided to defense counsel, and if Mr. Avery's bill of particulars does not contain that statement, I am including that as an additional as supplementary information, because that clearly was the agreement made by the Government, by Mr. Eugene Welch, the Assistant United States Attorney who was then in charge and at the March 11th, 1975 occasion when Judge Port ordered, among other things, that all of the items that the Government had agreed to furnish were to be furnished as a bill of particulars, together with the additional items required by the Court Order of March 11th, 1975.

Moreover, I want to state to the Court that I, for one, have relied very heavily on the expert's report furnished by

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the Government, with respect to voice identification, and more importantly with respect to interpreting all of the language of all of the tapes, and the argot used by the gambling fraternity, and the translating of the terms used in the tapes, in addition to translating the nature and effect, and substance of what the bets were, the language relating to bets, and so forth, so that it is very material, and relevant testimony.

And for my part, if the Government makes the concession that they are not going to use a new expert then, of course, my remarks now are academic.

My position is that if the Government intends to use an expert at trial that I am in a highly disadvantaged, prejudiced position, and not being able to effectively and properly cross-examine any experts that the Government does produce for whose report I have not been furnished reasonably in advance.

Frankly it is going to be the heart of the Government's testimony with respect to tying in all of the tape information

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that has been made available to me, at least, as one of the defense counsel.

To put it another way, I want the record to reflect that I would move to preclude any expert from testifying at the trial of this case for whose report I had not been furnished reasonably well in advance of trial in order to prepare for trial.

We still, incidentally, Judge, have not been given the name of that expert. We were made aware of the old expert. We have not, to this day, been apprised of the identity of the new expert, and I have been told that there is a new expert. However, his report has not been reduced to writing.

I argue that we are entitled to a written report of the expert. My information is that the bureau, and we have been told that the bureau regularly and in the regular course of its business, has experts prepare written reports in advance of trial, with respect to testimony such as this, and this is obviously indicated as being so because we were furnished with a written report by the previously assigned expert who since retired.

In short, I cannot proceed to trial and effectively cross-examine any Government expert unless I have his report and have an opportunity to study it and prepare possible rebuttal expert testimony, effective cross-examination and all of that. That is it.

I join in -- well, I think that it is a sensible solution for the Court to grant us a reasonable continuance with the direction to the Government or provide us with the expert's written report, if he wishes to use a Government expert.

THE COURT: Well, Mr. Scaccia, I suspect, or am I reading you wrongly, that you would have no objection to the Government using the original expert?

MR. SCACCIA: That is correct your Honor.

THE COURT: And these experts will be testifying as to voice identification, is that what you are saying?

MR. SCACCIA: As I understand it, Judge. It will be voice identification, translating the argot, using the tapes

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dated May 5th. My response to Mr. Avery dated May 19th, and filed in this court on that date, provides that the Government has made the remaining transcripts, all of the tapes available for inspection and copying by the defendant. I received no demand, your Honor, for -- well, the tapes and transcripts were provided to defense counsel shortly thereafter and I received no demand that they be copied. It is as simple as that.

With regard to the expert's report: There will be another expert testifying at this trial, other than the one that rendered the original report to the Government. That expert has not given me a further written report. He has been reviewing the fact this week, and I have discussed the case orally with him and I have not requested that he provide me with a written report.

It is my opinion that to do that at this time for my use would be senseless, and there is no requirement that it be done just for the defendant's use, in the law.

Mr. Avery this morning pointed

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back in March or April of 1975, Judge. This was part of the case, and the Government had volunteered, on request, had volunteered to furnish certain disclosure materials, including all of the statements by all of the defendants.

I must put that forward so that it was clearly understood from the start, that the Government had agreed to furnish all of the defendants with all of their statements.

THE COURT: All right. We will hear about that in a few minutes. Continue, Mr. Avery.

MR. AVERY: All right. I have now located on my table the transcript referred to previously, and that is of the date of 5-12-74 purporting to be a transcript of a conversation between Stanley Reppucci and Thomas Gaetani, in which, for the first time, to my knowledge, the name "English" appears as a part of this conversation. It was for the reason that I suspected that perhaps there may have been some conversations of this sort between other defendants that I felt that the defendant English was entitled to all of the conversations, transcripts of all of the

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conversations between any of the defendants, and I offered to pay for them.

I understood that from what Mr. Scaccia says, that this had been offered by the Government, but no arrangements for payment had been worked out.

But further than that, I might point out to the Court, that I was furnished, in response to my discovery request, with a group of sheets of paper which purported to be transcripts of wiretap conversations, or wire-taped conversations of several dates, and March 7, 1974; March 10, 1974; March 12, 1974 and March 14, 1974.

Then April 11, 1974; April 16, 1974; April 18, 1974; April 19, 1974, April 21, 1974 -- I am sorry, April 22, 1974, April 21 and April 22, 1974.

These were furnished to me in response to my request for the copy of the transcript which purported to be transcript of conversations of the defendant.

The Government's bill of particulars, on page one of the bill of particulars dated May 5, 1976, indicates that pursuant to the order

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of the Court, dated March 7th, 1975, certain statements, certain particulars, one of which is that a copy of that portion of the transcript which contains statements of the defendant will be produced to defense counsel.

Presumably it was in response to this bill of particulars that the transcripts were furnished to me, and I call attention to the Court that these conversations were never particularized as to the defendant English, but the grouped defendant English, Maruca, defendant Cioppa, jointly, also known as "Herbie," and I would be glad to hand this to the Court.

THE COURT: That is unnecessary.

MR. AVERY: It was only this noon that I was furnished with a similar group of transcripts, dated March 12th, April 11th, April 22nd, 1974; three days. Presumably three conversations in which the same, or part of the same transcripts which were furnished previously, have now been identified, with the name "English." So, for the first time I am now aware that the defendant English is alleged to have participated specifically in conversations

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which occurred on those days.

Now, parenthetically, at the time that that transcript, these original transcripts were given to me in May, the defendant and I, in the company of Mr. Scaccia, and I believe also his client, came to Syracuse, and did listen to the tapes, with the consent of the United States Attorney's Office, and did talk with the agent in charge, Mr. Hazelwood. At that point I was informed that there was one conversation and that is, that is one conversation Mr. English was involved in, and that was the conversation of April 22nd, 1974, and at that point it was indicated to me when the tape was listened to, at the certain point in the conversation, defendant Cioppa, who had been talking discontinued, and it was alleged that defendant English picked up the phone and continued the conversation.

It is significant that in the sheets just now furnished to me, this matter has been indicated on the transcript dated April 22nd, 1974.

So, Your Honor, for the first time it is now apparent to me that the Government

claims that there will be voice identification of defendant English on transcripts involving more than one day; that there will be voice identification on three days of those which were originally furnished to me, as possibly containing the defendant English.

I need -- my motion today is for a continuance for the reason of surprise, and prejudice at this point.

The defendant will need additional time to assess this new form, and at the same time I have other reasons and other requests for a continuance, reasons to support my request for a continuance and these are among other things that we have never yet been furnished, defendant English has never yet been furnished with any report of an expert concerning the matters of the scope of the business, which is alleged to have been conducted, the nature of the parties involved, this expert opinion-kind of report, which we had been furnished originally.

Now, I might say that we had been furnished originally with expert opinion reports under Rule 16 by an expert who had,

(Whereupon, the proceedings were recessed at 12:30 p.m. until 2:00 p.m.)

A F T E R N O O N S E S S I O N

THE COURT: Gentlemen, the Court has had an opportunity over the lunch hour to consider your arguments and look at the F.B.I. files and the records that were submitted to us by defense counsel.

Let me, first of all, say that I understand that the Government has a new expert who has not made a report and I do not see where the defense has a right to force that expert into making a report. If a report was made I think that the Government should submit it to the defense counsel, but since the Government does not have one, I do not see where they must make one in order to submit it to the defense counsel.

I understand the excellent argument that was made by defense counsel with regard to the expert's report, but in that regard I am going to deny it, not only on the ground that the Government does not have to make one, but upon the ground that I have reviewed the Department of Justice Field Bureau of Investigation report and find that while the pages are not numbered

The case has been adjourned from day to day this week, and not entirely the fault of defense counsel, but every time that the case has been called, and my recollection is, even on November 9th, with the exception of one or two attorneys, not including those here present, the case was marked ready by everybody. It is unusual, to say the least, that now, on the 19th of November it is not ready, after having been ready for at least 8 or 9 days, and after the notice that has been provided to them.

The courts in this nation do not wish to prejudice the defendants' rights, of course, and our charge was the duty to protect those rights.

Likewise we have a duty to protect the general public, and it is difficult, in this situation, to know what to do along that line.

I suspect that all of the counsel who have spoken believe what they say to be true. I frankly find it very difficult to see where the Government would

retain a second expert who would say something different than the first one. I frankly don't see why you need a second expert, if the first one isn't dead. I frankly do not see why you have conversations with your defendant, why he or the defense counsel cannot ferret out from those conversations who said what to whom, and when.

However, it does seem to me that it will not prejudice or unduly delay justice, if we do have a slight continuance in this action. I understand Mr. Chalenski's suggestion, but I must say to Mr. Chalenski that, as perhaps everyone here knows, this Court will not be sitting here in Syracuse on November 22nd, and next Monday, and the 25th is Thanksgiving, and I would not expect to call a jury back on next Friday.

In view of all of the arguments and the facts and circumstances given here, and I am very disturbed to do this, I am going to grant a continuance until November 29th, which is a week from Monday. I would request, and the only motion that I am granting right now is the motion for a continuance.

days for this proceeding, and here during the trial in November, and he was the agent that testified in June in another hearing in this case.

THE COURT: Well, I am inclined to think that we have piece-mealed this case todeath, almost, and I think, Mr. Avery, that I would prefer that you get in a half or three-quarters of an hour of cross examination of this witness and then the Court will attempt to see what we can do about Friday.

I can only say that unless we can get this case going again on Friday, we are going to have considerable trouble because the other criminal case that I mentioned to you I have been informed will take three or four weeks.

MR. AVERY: I asked the Government if it plans to have the other witnesses here Friday that will be needed for that day.

MR. CHALINSKI: Yes, I anticipate having the remainder of our required witnesses here on Friday.

MR. AVERY: I think that the cross examination might be more effective, and more coherent if it was all done on the same day, but if the Court wishes, I will go ahead.

THE COURT: Yes, I wish that you would do that, Mr. Avery.

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that tape, and I think it was pointed out by Mr. Scaccia in his brief, and in other cases, that the whole statutory scheme, including the period prior to the delay, including the period immediately following the termination of the order, the whole period is subject to this -- to the judicial scrutiny, and the first sentence before the requirement of immediacy illustrates that point.

THE COURT: I am not agruing that, Mr. Avery.

MR. AVERY: Well, Your Honor, may I ask this, then --

THE COURT: The fact is that there have been many motions in front of this Court. You made one and you asked for an evidentiary hearing for the purpose of finding out what the delay was. The Government consented to that hearing. We have come here to hold that hearing, and that is all tht we are going to hold. We are not going to try the case in this hearing.

MR. AVERY: May I request the Court's permission, then, to amend our motion to include the factual material concerning the period when the tapes were first produced?

THE COURT: Why don't we get on to the basis of this hearing? It is possible, is it not, or you wouldn't have made the motion, that any amendment might

not be necessary.

MR. AVERY: That is recognized.

THE COURT: Then let's get through this part and after we get through that, you may then move to amend your motion which can be made after you make another motion.

BY MR. AVERY:

Q. Now, on direct examination, Agent Hazelwood, you indicated that you listened and reviewed, now -- that you listened and reviewed the tapes as they were given to you each day, is that correct?

MR. CHALINSKI: I have no such recollection of such testimony on direct examination. That was on cross examination by Mr. Scaccia. I object to the question.

THE COURT: All right. You are going right back into what the Court just asked you not to do and include, Mr. Avery. However, let's clear it up.

Do you recall, Mr. Hazelwood, whether you testified on direct or on cross as to what Mr. Avery has just asked you?

THE WITNESS: No, sir, I do not.

MR. AVERY: May I ask co-defense counsel what their notes indicate?

THE COURT: Sure.

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1 THE COURT: But where? Mr. Scaccia is
2 not here.

3 MR. SHANAHAN: No, but Mr. Avery,
4 specifically when we were in here in relation to the
5 fact that there were no more prospective jurors, I
6 was challenged by my defendant as to why this case
7 was being tried right at this time when there would
8 be motions coming up on the 3rd of May, and why
9 wasn't he a party to those motions. And I, of course,
10 was approaching him with the proposition of accepting
11 the 12 jurors, and I was challenged as to why we were
12 involved with a trial here when Mr. Scaccia's client is
13 not going to trial until sometime after May 3.

14 Now I do not wish to say this to
15 challenge my defendant, but I do, and publicly and
16 in the Courtroom challenge Mr. Scaccia and told him
17 that my defendant was on trial and that he should stay
18 away from him and not give him any advice, particular-
19 ly when we were, in effect, in session.

20 THE COURT: What motion was he referring
21 to?

22 MR. SHANAHAN: The motion presumably as
23 to the timing. I think the Speedy Trial determination,
24 which would come on on May 3rd.

25 MR. CHALENSKI: Would that be a motion to

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1 THE COURT: Yes, and it was served upon
2 you as his attorney?

3 MR. SCACCIA: That is correct.

4 THE COURT: All right. As I said, the
5 motion is denied and an opinion will follow.

6 Now, Mr. Shanahan, under date of April 25,
7 1977, you also made a motion and I think that that
8 motion should be argued at this time. Those papers
9 are also addressed to Mr. Scaccia and Mr. Avery, and I
10 assume that they join in your motion?

11 MR. SHANAHAN: Yes, your Honor.

12 MR. SCACCIA: Yes, we do, your Honor.

13 MR. AVERY: Yes, your Honor.

14 THE COURT: All right. Then I think that
15 that motion should be argued at this time.

16 Mr. Shanahan?

17 MR. SHANAHAN: Your Honor, the substance
18 of the motion relative to the first prayer deals with
19 the procedures relative to application made or failure
20 to have made application by the United States
21 Attorney and having presented the evidence relative
22 to a companion Indictment 74-CR-144. The law, relative
23 to that particular Act is set forth in Brodsen and in
24 Marion, which I am sure the Court is familiar with.
25 In Brodsen, Mr. Justice Clark held that although

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1 defendants in this case, so I would think that an
2 examination of the grand jury testimony would be
3 relevant to this motion, perhaps much more so than
4 the determinations made by Judge Port in relation to
5 these applications and extensions.

6 It is conceded that there was no second
7 application relative to 1984, and that certain was the
8 basis for the decision made by Judge Port in 1984.
9 I think that the same decision should be made on the
10 same factual basis as presented to Judge Port back in
11 December for purposes of this motion, wherein we
12 request that the indictment be dismissed.

13 Now, that is a broad conceptual presenta-
14 tion relative to the issue before you, and I think
15 co-counsel probably will take a somewhat different
16 tack and become more involved with the technical
17 aspects of this. But I would move that the motion
18 to dismiss on the basis of the failure to adhere to
19 the procedures as specifically set forth and as
20 implemented by Brodsen and Marion, that the indictment
21 be dismissed.

22 THE COURT: Thank you, Mr. Shanahan.

23 Mr. Scaccia or Mr. Avery?

24 MR. SCACCIA: May it please the Court,
25 counsel, on November 8, 1976, a motion to dismiss the

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1 indictment in 74-CR-144 was argued here in this
2 Courtroom before Judge Port. It is noteworthy that
3 Judge Port, of course, was the issuing Judge who
4 initialled the Order involving all of the wiretaps
5 as best we knew then. And the Government had made a
6 concession on the record to the effect that indeed
7 some of the evidence presented before the same grand
8 jury returned Indictment 74-CR-142, the instrument or
9 instant indictment here for consideration, had also
10 been presented during the course of presentation which
11 stated a basis for the 74-CR-144 indictment. In
12 terms of violation, your Honor, Judge Port had, by
13 virtue of his MP 15, MP 16, MP 17 wiretap authoriza-
14 tions, had specifically had presented to him,
15 information and evidence and probable cause that a
16 violation involving Title 18, Section of the Code
17 Section 1955, i.e., the illegal gambling offense
18 section, and the Court had specifically issued an
19 authorization Order on that basis.

20 The indictments were all returned on
21 November 18, 1974 by the same Federal grand jury and
22 it was not until after demands for Brady material had
23 been served upon the Government, it was not until
24 sometime in September of 1976, just prior to the
25 time that the motion was made and argued before

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1 Judge Port last November, that the Government
2 disclosed by letter, that that procedure required in
3 Brodsen, had not been followed with respect to 144,
4 the implication -- and of course the letter is
5 attached to the moving papers here, your Honor -- the
6 implication left much to the imagination and it was
7 not until we actually argued before Judge Port and
8 had on the record concessions by the Government
9 bearing in mind the Government filed no written
10 response to the motion papers nor has it done so
11 today, in short, both the Court and counsel had to
12 rely entirely on the limited concession that was made
13 by the Government which grounded the decision by
14 Judge Port.

15 On last Thursday or Friday this past
16 week, your Honor, with respect to an appeal that
17 is being perfected by the Government with respect
18 the Order of dismissal of the indictment by Judge
19 Port in the 144 indictment, we, for the first time,
20 had possession and had in our hands, the actual
21 transcript of the November 10, 1976 procedures, i.e.,
22 the argument -- pardon me, November 9, I think it was
23 1976 before Judge Port here in this Courtroom. Your
24 Honor was sitting on the bench. I ought to mention
25 parenthetically that the Government had been

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1 attempting -- both sides had been attempting to get
2 the record, the Government had to apply to your Honor
3 for an Order extending their time to file and perfect
4 the record. And subsequently following the expiration
5 of the term of the enlargement of your Order, your
6 Honor, the Government then had to apply to the
7 United States Court of Appeals for a further Order
8 permitting an Order -- or extension permitting the
9 filing. That was required by the terms of the
10 Court of Appeals. The brief and the appendix had to
11 be filed by April 21, 1977, which was last Thursday,
12 I guess. And it was not until after when we were
13 served with copies of the brief and appendix that we,
14 for the first time, had in our hands, the file, and
15 that is what gave rise to this motion, because the
16 record now very clearly supports our contention that
17 the grand jury, which was the same grand jury which
18 required 142 Indictment and 144, but more importantly,
19 your Honor, it seems to me that as a matter of
20 establishing a reasonable basis for this motion, that
21 the Government has applied to your Honor and had an
22 Order without objection, to include as part of the
23 144 record on appeal, the 142 Indictment, the MP 15,
24 MP 16, MP 17 applications, affidavits, orders, five-
25 and ten-day reports. That establishes, it seems to

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1 me, as a matter of law, that an extension of the
2 law of the case as ruled on by Judge Port, which
3 concededly is on appeal now, establishes the
4 law of the case with respect to 142. In short, given
5 the -- and I am hazarding an estimate at this moment,
6 that up to this very moment the Government has not yet
7 applied to any Federal Judge, much less Judge Port,
8 any Federal Judge for the Order required by Title 18,
9 Section 27 -- pardon, 2517(5), the requisite Order,
10 in terms of technical complaints, the Government is
11 free to apply to a Federal Judge at any time up to
12 and including the date of trial and can then make
13 its argument if objections are interposed as to
14 timeliness or whatever the objections are, but they
15 are required before they seek to divulge any of that
16 evidence, they are required by the terms of 2517(5),
17 to apply to a Judge for an Order. And that
18 application is tantamount to a de novo application
19 with respect to the probable cause and the Court has
20 to make a determination as to whether the illegal
21 evidence obtained, or the related offense, was really
22 a mask or a subterfuge for the Order, thereby raising
23 into question the underlying Order. And up to this
24 point in time, your Honor, the Government simply, at
25 least it is never revealed to the contrary to us, has

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1 never applied to any Judge, Federal or State, for the
2 Order specifically required before they may
3 divulge, and that divulging runs both to the grand
4 jury as well as to the trial. Now we have on a
5 documented basis only in our hands within the last
6 few days, the legally-established connection as
7 between the 142 Indictment and the 144 Indictment.
8 We now have the transcript, we now have the reasonable
9 basis as a matter of record, given the concessions
10 made by the Government both before Judge Port last
11 November and now given the Order signed by your Honor
12 making the 142 Indictment the MP 15, -16 and -17 part
13 of the record on appeal of 144.

14 Short of the argument, your Honor, is
15 that the 142 Indictment, given the law of the case
16 must also be dismissed, because of its determined
17 illegality, Judge Port determined the illegality, and
18 as lawyers, up until now we have not been able to as
19 a matter of record, because we have never had the
20 grand jury minutes supplied to us, established to
21 the Court a reasonable basis and the reasonable basis
22 is the brief and appendix that was just served on us
23 Friday, which specifically now make it MP 15, MP 16 and
24 MP 17 applications, affidavits and Orders, together

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1 appeal. The short of my argument, your Honor, is
2 that the law of case, as determined by Judge Port,
3 provides us with the basis for now making the motion
4 for dismissal of the indictment and I recognize
5 full well, of course, that 1st is on appeal. That is
6 my argument.

7 THE COURT: Thank you, Mr. Scaccia.
8 Mr. Avery?

9 MR. AVERY: Well, your Honor, I would
10 just address myself very briefly to the second part
11 of the motion being made by defendant McGrath today,
12 and that is the Speedy Trial motion. I have the
13 computation of time as relates to Masciarelli and
14 English, and while I have not examined the computation
15 of time with reference to defendant McGrath, I assume
16 that Mr. Shanahan will speak to that motion.

17 But I would simply point out, a very
18 cursory examination at this point, of the sheet
19 furnished to us by your Honor, would indicate that
20 the period from July 1st, 1976, which is the effective
21 date in this case, I think that is agreed by all
22 defendants, 180 days for the trial, and 60 days for the
23 retrial. As to the 180 days, the computation furnished
24 by the Clerk would indicate that until November 29,
25 1976, at which time this case began its first trial,

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1 there had been approximately -- there had been
2 85 -- correction, 66 excludable days and therefore
3 that 85 days had run.

4 My brief examination of the dockets
5 previously furnished would indicate this seems to be
6 approximately correct. I would like to have a chance
7 to make a more definitive judgment in this regard by
8 a more complete examination, but I think that is
9 approximately correct. So as far as the period from
10 November 30, 1976 to date or to May 3, when this
11 case has been now subject to call, the computation
12 indicates 139 days excludable, and I believe there is
13 a definite conflict in our position in this regard,
14 the period from -- in particular the period from
15 March -- correction, from February 14 to May 3. The
16 mistrial was granted with the -- and the period of
17 time until November 14, 1977 was clearly -- to
18 February 14, 1977 was clearly conceded by the
19 defendants to be excludable time, no question about
20 that, but from that point on, I believe there has
21 been no continuance granted by the Court in the
22 interest of justice or otherwise and there has been
23 no concession by the defendants that any period of
24 time since February 14, 1977 should be excluded.

25 I note that in the docket there is an item

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1 THE COURT: Any objection to that,
2 Mr. Shanahan?

3 MR. SHANAHAN: No, your Honor.

4 THE COURT: All right, then we will
5 adjourn for a minute or two while we see if we can
6 get Mr. Avery to come into Chambers and it should be
7 done here, correct?

8 MR. SHANAHAN: Yes, your Honor.

9 THE COURT: All right.

10 (Recess.)

11

12 THE COURT: All right, Mr. Avery, the
13 reason I requested you to come into Chambers was by
14 agreement between counsel, and it is my understanding
15 that on the jury that has presently been questioned
16 by the Court, on the voir dire, that you have had some
17 conversations with at least one and maybe more members
18 of that jury, and the Government, the defense counsel
19 and the Court would like you, if you would, please,
20 to -- for you to tell us your relationship with the
21 juror or whatever conversations --

22 MR. AVERY: The only juror I know is Bob
23 Snurr, who has been a member of the Army National
24 Guard here in Central New York for 35 years or so,
25 recently retired as a colonel. I joined the Army

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1 National Guard about the same time he did in 1949, and
2 we have been associated ever since in very close
3 capacity in connection with Syracuse National Guard
4 activities. Other than that, I do not know any of
5 the members of the jury. I know him and I know his
6 wife, and to some extent his son, who is also a member
7 of the National Guard over in Auburn, but he is the
8 only one I know.

9 : We did exchange greetings when
10 I saw him here, and I have had a conversation with
11 him particularly concerning the matter of his mother's
12 glaucoma situation, and he very concernedly asked me
13 how long it would last. I said I did not know, I
14 referred him to Al Doggett, who later told me that
15 some arrangements could be made so that he -- since he
16 has to take his mother to the eye doctor sometime in
17 the middle of next week, that some arrangements could
18 be made in that connection.

19 THE COURT: So with regard to the McGrath
20 case, the only conversation, I take it, that you say
21 that you had with Mr. Snurr, was with regard to the
22 problem that he might run into next week if the case
23 went over into next week?

24 MR. AVERY: Yes, other than that I
25 suspect that he may know that some of the other members

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of this Cannone group had pled guilty as it was indicated in the paper this morning.

THE COURT: Well, how do you know that he -- or why do you suspect that he knows that?

MR. AVERY: Well, I think it is because he wondered about who was on trial and what the nature of the circumstances was. And I think that that is the -- I gather that he knows. He did not come right out and say so, but I gathered that he knew.

THE COURT: That is from what he said to you this morning?

MR. AVERY: No, no, I had a conversation -- I ran into him in the -- in connection with this -- his mother's problem. When that was being discussed and started in the men's room, ran into him when I went in the men's room, happened to see him in there, but in the course of the conversation, I sensed that -- that he may have known that these others, some of the others had pled guilty.

THE COURT: You have stated that he did not come directly out and say that. Is there anything in your recollection that he did say that, gave you that impression?

MR. AVERY: No, nothing specifically.

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1 THE COURT: That knowledge would not,
2 I do not think, disqualify him. It is not something
3 that defense counsel, I would think, would be
4 pleased with, but I do not think it is a dis-
5 qualification.

6 MR. AVERY: No, your Honor.

7 I made that known to Jim last night.

8 MR. SHANAHAN: If I may say, Mr. Avery,
9 the fact that you knew this gentleman personally was
10 probably toward the middle or the end of the
11 conversation rather than at the beginning of the
12 conversation as to what took place before you were
13 asked to come in here. It seems that your conversing
14 with the juror out in the area where we have little
15 else to do but run into everybody that is involved in
16 any manner, prompted the discussion, it was not as a
17 result of my having been made aware of the fact that
18 you knew this juror.

19 It was only subsequently that that area
20 of the conversation developed.

21 MR. AVERY: I have known him, I myself,
22 very closely, of all of the people I have known in
23 Central New York, well, all of New York State, in the
24 military sense. I have probably known him as closely
25 as anyone else, General Colin P. Williams and

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1 Collier, who is now a general, retired, Frank Iyer
2 and Bob Snurr. Probably the four of us have been
3 as close as anyone in the National Guard set-up in
4 Central New York, so that is why I had not expected
5 to see him in the Courtroom and we did exchange
6 greetings.

7 THE COURT: I have to ask you, have
8 you had any conversations with any other jurors other
9 than Mr. Snurr?

10 MR. AVERY: No. While we were discussing
11 the problems that Bob had in connection with his
12 mother, the other juror, who appears to be a friend
13 both of Mr. Shanahan's and the Court's, came over and
14 did remark, and I think maybe in Al Doggett's hearing,
15 that he also might have some similar problems during
16 the course of the trial.

17 THE COURT: Yes, that is Mr. Burgess,
18 Juror No. 5.

19 MR. AVERY: I do not know him at all.

20 THE COURT: Was Mr. Burgess present at
21 any time when whatever was said, you got the

22 that Mr. Snurr knew about the guilt
23 pleas of some of the co-defendants?

24 MR. AVERY: No, I do not know whether he
25 knows or not, and I do not even know that Bob does.

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1 Mr. Scaccia were present in the Courtroom in front of
2 the Bar.

3 MR. SHANAHAN: Right, and I did not want
4 that and at one time Mr. Avery came over to me and
5 I did not want that either. He is not co-counsel, he
6 is not of counsel nor is Mr. Scaccia, and I advised
7 Mr. Scaccia of that last night, and that he is
8 intermittently speaking to my client, whom he formerly
9 represented, and causing me problems.

10 MR. CHALENSKI: The situation is compounded
11 by the lack of jurors too.

12 THE COURT: Yes. Well, Mr. Shanahan, you
13 are stating that although you had thought at the
14 conclusion of the Court yesterday that you would not
15 exercise your last challenge. You have thought it
16 over and you do have a challenge left?

17 MR. SHANAHAN: Yes.

18 THE COURT: And the jury has not been
19 sworn and impanelled, so you are thinking of
20 exercising that challenge?

21 MR. SHANAHAN: Yes, I am.

22 THE COURT: Which would, of course, give
23 the Government the right to exercise theirs on that
24 juror?

25 MR. SHANAHAN: Well, I do not know that it

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1 MR. SHANAHAN: Yes, your Honor. I thought
2 that if the jury had not been impanelled and if there
3 were more jurors coming in, I thought seriously last
4 night about challenging one jury that remains on that
5 panel and it is true that Mr. Avery is out in the lobby
6 area and the jurors, much to my surprise, are there.
7 I do not think they should be there. I have no idea
8 where they might be, but there seems to be, as far as
9 I can see, altogether too much co-mingling of people.
10 It is just not proper, in my opinion.

11 As far as Mr. Avery specifically, I
12 would not want to make any definitive statement, but
13 I know that he is out there and I know that the
14 defendant is mingling out there, not speaking, I do
15 not think, to the people but present nevertheless and
16 there is little place for him to be other than at
17 counsel table, and you have had a previous matter on
18 this morning, and as a result everyone is mingling
19 around and I do not think that is proper.

20 THE COURT: I agree. I think that the
21 jury should have been either placed in the grand jury
22 room or in the jury deliberation room. However, since
23 this was the only case on this morning with the
24 exception of the arraignment, which did not involve any
25 of the other defense counsel that might be involved

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1 in companion indicted defendants, I suspect that the
2 Court and the Clerk did not expect any of the other
3 counsel to be here, and therefore did not take the
4 precautions that might have been taken otherwise.

5 MR. SHANAHAN: Well, your Honor, I might say
6 that last night in front of a newspaper reporter, I
7 asked that one not return.

8 THE COURT: One of the other counsel?

9 MR. SHANAHAN: Right.

10 THE COURT: But that was not because of
11 any jury problem.

12 MR. SHANAHAN: No, but again, he is
13 suggesting to the jurors whether they can leave or not
14 leave the jury box and such, as that which I do not
15 think he has any business doing.

16 THE COURT: Who is "he"?

17 MR. SHANAHAN: Mr. Scaccia. You try your
18 case and you leave the Courtroom is the way I think it
19 should be done rather than listening to a jury being
20 impanelled when obviously you have got work to do back
21 in the office or should have.

22 THE COURT: What you are saying,
23 Mr. Shanahan, and I noticed this and I assume
24 Mr. Chalenski noticed it also, that during the entire
25 impanelling of this jury, both Mr. Avery and

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2 the Bar.

3 MR. SHANAHAN: Right, and I did not want
4 that and at one time Mr. Avery came over to me and
5 I did not want that either. He is not co-counsel, he
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16 over and you do have a challenge left?

17 MR. SHANAHAN: Yes.

18 THE COURT: And the jury has not been
19 sworn and impanelled, so you are thinking of
20 exercising that challenge?

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23 the Government the right to exercise theirs on that
24 juror?

25 MR. SHANAHAN: Well, I do not know that it

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1 is appropriate at this point to disclose the basis
2 upon which I would excuse a juror, but perhaps we
3 could stipulate to it now. I do not know that that
4 is necessary.

5 MR. CHALENSKI: Your peremptory challenge,
6 Jim?

7 MR. SHANAHAN: Right.

8 THE COURT: There is another situation,
9 if you challenge that jury, we do not have any more,
10 we would only have 11 impanelled. We do not have any
11 alternates and if you do challenge the jury, there
12 would be no further selection and I would declare a
13 mistrial unless both of you would stipulate to
14 accepting 11 jurors. But I think that we have to come
15 to some conclusion with regard to what has happened
16 this morning with the jury, and what has happened
17 yesterday.

18 You have disclosed something to me that
19 I did not know about. Are you saying, Mr. Shanahan,
20 in a general sense that after the close of Court
21 yesterday, that there was some conversation between
22 either Mr. Scaccia or Mr. Avery or both with some of
23 the jurors?

24 MR. SHANAHAN: Oh, it was going on this
25 morning, your Honor.

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1 THE COURT: But where? Mr. Scaccia is
2 not here.

3 MR. SHANAHAN: No, but Mr. Avery,
4 specifically when we were in here in relation to the
5 fact that there were no more prospective jurors, I
6 was challenged by my defendant as to why this case
7 was being tried right at this time when there would
8 be motions coming up on the 3rd of May, and why
9 wasn't he a party to those motions. And I, of course,
10 was approaching him with the proposition of accepting
11 the 12 jurors, and I was challenged as to why we were
12 involved with a trial here when Mr. Scaccia's client is
13 not going to trial until sometime after May 3.

14 Now, I do not wish to say this to
15 challenge my defendant, but I do, and publicly and
16 in the Courtroom challenge Mr. Scaccia and told him
17 that my defendant was on trial and that he should stay
18 away from him and not give him any advice, particular-
19 ly when we were, in effect, in session.

20 THE COURT: What motion was he referring
21 to?

22 MR. SHANAHAN: The motion presumably as
23 to the timing. I think the Speedy Trial determination,
24 which would come on on May 3rd.

25 MR. CHALENSKI: Would that be a motion to

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cases be heard by the trial judge. If Your Honor does hold that all of the remaining defense counsel have waived their motions by not making them in a timely manner, the Schultz motion would be put over until September. Unless you hold now or choose to hold that you would be the trial judge, you can hear it at this time.

THE COURT: Well, the motions certainly don't strike me as timely. These motions that are made on the eve of trial calendar aren't timely, but it seems to be the habit up here. It is ever increasingly, I come up here to a heavy motion calendar rather than cases ready for trial.

When do you say these motions should have been made?

MR. CHALENSKI: These motions should have been made shortly after the wiretap intercept orders and applications were served on the attorneys representing the defendant.

THE COURT: Is there any rule requiring that?

MR. CHALENSKI: Your Honor, Rule 12, I believe it is 12(c) provides that motions shall be made within a time provided by the judge. An attorney at that time representing many more of the defendants

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than he does at this time made a motion to suppress. That motion was heard on January 13th. It was denied by the judge at that time.

THE COURT: What did the judge order about motions?

MR. CHALENSKI: The judge ordered that all motions be returnable January 13, 1975.

THE COURT: All motions?

MR. CHALENSKI: Yes, Your Honor.

THE COURT: And no motions to suppress these wiretaps were made at that time?

MR. CHALENSKI: That's correct, but the attorneys did move for the copies of intercept orders and copies be provided to them. That was done following January 13th, and they received a copy of those papers.

THE COURT: When, Mr. Chalenski?

MR. CHALENSKI: March 26th.

THE COURT: When?

MR. CHALENSKI: March 26, 1975.

THE COURT: Was there anything said about you could make the motion after you received the wiretap?

MR. CHALENSKI: Not specifically,
Your Honor.

(Hanging).

THE COURT: Well, I think the matter is sufficiently confused that it would be an injustice to say that the defense have waived their rights to make these motions. I will hear the motions.

MR. CHALENSKI: Your Honor, I have two preliminary points. Well, excuse me, one remaining point this morning. On arrangement with Attorney Wineburg, I have had three F.B.I. agents appear for the purpose of being served with a subpoena by Mr. Wineburg to testify in this case and to produce documents. The duces tecum portion of the subpoena calls for a lengthy list of documents to be provided to him. I move to suppress that or to quash that portion of the subpoena under Rule 17(c). The information requested is discovery material, some of which has been previously requested in this case and refused. Furthermore, much of the information requested here is confidential and relates to informants, F.B.I. reports which are not returnable at this time.

THE COURT: Mr. Wineburg?

MR. WINEBURG: Many of the representations Mr. Chalenski makes are correct.

THE COURT: I can't hear you.

MR. WINEBURG: Many of the repre-

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23

for the same.

The sole issue appears to be:
Who is to do the copying, and who is to pay
for the same. The cost of photocopy re-
production will be reimbursed to me and as
an assigned attorney, and it goes on to say
that he will advance the cost.

The whole issue on the transcript,
your Honor, was the cost.

THE COURT: Well, gentlemen, I
am sorely disturbed with the developments in
this action. I think that all of you knew
that a special jury panel had been ordered
into this court at Syracuse on November 9th,
and in the anticipation that there would be
a judge sitting here at that time, even
though at the time that the jury was ordered
in, no judge had been appointed. Nor had
anybody volunteered to come out of any other
district to come up here and sit at that time,
as far as I know.

As you know, the case on
November 9th was adjourned because of some
prior commitments of some of the other at-
torneys that were involved in this case.

The case has been adjourned from day to day this week, and not entirely the fault of defense counsel, but every time that the case has been called, and my recollection is, even on November 9th, with the exception of one or two attorneys, not including those here present, the case was marked ready by everybody. It is unusual, to say the least, that now, on the 19th of November it is not ready, after having been ready for at least 8 or 9 days, and after the notice that has been provided to them.

The courts in this nation do not wish to prejudice the defendants' rights, of course, and our charge was the duty to protect those rights.

Likewise we have a duty to protect the general public, and it is difficult, in this situation, to know what to do along that line.

I suspect that all of the counsel who have spoken believe what they say to be true. I frankly find it very difficult to see where the Government would

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affidavit when he stated in Paragraph 20 of that affidavit that he had some evidence that the business had been conducted as late as June 11th, 1974. The Judge in Broome County continued to talk about 55 days which he related back to April of 1974, and therefore I do not agree with his decision, at least in the indictment that we are concerned with here.

So I would deny that. Of course, all of the defense counsel may have an objection to my rulings here.

I feel that this case was adjourned from November 9th, it was set down for trial on that date and I do not know the date before that that defense counsel was advised of those facts, but I would suspect it was before I was confirmed. I suspect that they knew that they were to be ready for trial on that date and, as I recall, they were not ready at that time because one of the counsel was involved in another trial. The case was then adjourned, and as I recall, the case was marked ready by all of the Defendants at that time, and we had several conferences and some of the Defendants pled guilty and this case was then held until today.

I think that under those circumstances the case should proceed to trial at this time.

MR. AVERY: There is one other motion

which I made for the delivery or the opportunity to secure copies of the additional transcripts which did not apply just to Defendant English, or to Defendant Masciarelli?

THE COURT: Well, the Court, in that instance, finds that there were motions made with that in mind, and I also find that Mr. Avery did make the statement in May of 1976 that he would advance the cost if the Government would reimburse him through an Order of the Court.

I understand that the section of the United States Code that allows that could have given the latitude to the Court to allow that. I am not sure why the Court did not allow that. I am certain, however that that issue was not pushed until now, and I suspect that it should not be pushed at this time because I think that the argument of defense counsel in that regard saying that they pressed for discovery, and at the same time pressed for a speedy trial, and on the other hand said they were ready, and it seems to me that they-if they wanted to press that issue they could have done so earlier than today.

It seems to me that the Government has offered them the opportunity to at least hear what was on those tapes, and therefore I will deny that motion,

also.

MR. AVERY: May I point out the record on May 24th of this year in which, we had Judge Port, I believe it was Judge Port, and he made the decision and he denied this, at my request, without prejudice to renewal by counsel before the trial Judge.

I would be pleased to hand up a copy, if the Court wishes. This is May 24th (offering). That is the reason why I renewed the motion again at this time, and I had discussed it at length with the Assistant United States Attorney.

THE COURT: Well, I suspect, Mr. Avery, that that denial of the motion was towards the thrust of the motion, rather than towards the cost of the photocopy reproduction of whatever you wanted at that time.

I could not see how the Defendant has been prejudiced in this case, and I can see how the people and the Government will be prejudiced if we continue this case any further. If this is continued further, then I suspect that counsel may have a good argument as to why they did not get a speedy trial. The speedy trial, it seems to me, that at some time or other these cases are going to have to come to trial. To withhold the decision until the time of the trial

to whether or not you are entitled to what you ask for, even with payment by you, seems to me to engender another delay in the trial of this case. That is not what you want, and that isn't what the Government wants.

I suspect that we ought to get on with the issue as to whether or not the Defendants should be tried or should not be tried. I think that what we should do is start the trial now.

MR. AVERY: I renewed the request because it had been referred to the trial Court for authorization for payment. This was inherent in Judge Port's decision. And an additional reason, I might point out is the fact that just about a week ago I guess it is now, I was given a copy, a two-page copy of a transcript of one of the other telephone intercepts in which my client's name was made, my client's name was named.

Now, how many other transcripts the Government has in which my client is named or in which he is involved, I have no way of knowing, and it is for that reason that I initially made the request in May, as I say, I was informed by Judge Port that there being no argument over furnishing the copies, and the Government is willing to furnish the copies, but at ten cents a copy, and that has been since the beginning.

THE COURT: You mean ten cents a page.

AFFIDAVIT IN RESPONSE TO MOTION TO CONSOLIDATE.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----+-----	:	74-CR- 142
UNITED STATES OF AMERICA	:	
	:	AFFIDAVIT
VS.	:	IN
	:	RESPONSE
FRANK S. CANNONE, et al	:	TO MOTION
-----+-----	:	TO CONSOLIDATE

DANTE M. SCACCIA; attorney for Raymond D. Masciarelli, respectfully shows the court:

1. I am an attorney at law, duly admitted to practice in this Court. I am the attorney of record for Raymond D. Masciarelli.
2. The defendant Raymond D. Masciarelli, had been named with ten other defendants in this indictment. Up to November 16, 1976, I was also the attorney of record for the defendant James W. McGrath. On that date, this court called after a hearing that James W. McGrath was entitled to separate counsel: proceeded to assign James P. Shanahan, Esq. to represent James W. McGrath and ordered a severance for the defendant Masciarelli and adjourned that case to December 20, 1976, for trial.
3. The courts ruling was based in large part upon a decision United States -v- Carrigan et ano, D Nos. 74-2056, 74-2057 decided by the United States Court of Appeals for the Second Circuit, November 3, 1976.

At this point, substantial prejudice to both defendants Masciarelli and McGrath would be present in the event of a joint trial.

AFFIDAVIT IN RESPONSE TO MOTION TO CONSOLIDATE.

Both defendants would be deprived of that Sixth Amendment right to counsel in the event of a joint trial.

The specific nature of the possible conflict of interests rising from my representation of both defendants has already been disclosed to the court and if it's necessary to do so again and IN CAMERA hearing is requested for that purpose.

WHEREFORE, I respectfully ask this court to deny the Governments application for an Order joining for trial the defendants JAMES W. MCGRATH, RAYMOND D. MASCIARELLI and JON N. ENGLISH in the above-identified case.

DANTE M. SCACCIA
Attorney for Defendant
Raymond D. Masciarelli

Dated: Syracuse, New York
January 10, 1977

TRANSCRIPT OF HEARING Held November 17, 1976.

that have been provided us, and both tapes as well as the transcript, and translate the nature and effect of the gambling terms and transactions that are contained in those tapes.

THE COURT: Thank you. Mr.

Chalenski?

MR. CHALENSKI: I am somewhat troubled by the length of this motion, and it apparently delays this pre-trial. There has been an allegation of certain conversations that took place during the spring of 1976 between Mr. Avery and Mr. Hazelwood. Mr. Hazelwood is here, and I do believe it would be appropriate, at this time, to put Mr. Hazelwood on the stand to testify to those versions -- to testify as to his version of what took place at this time. I believe that that would shed some light on what really might be any failure on anyone's part to have identified English as the person in that transcript that was provided to Mr. Avery, and it is his own fault, and there should be no continuance granted at this time because of the fault of Mr. Avery, himself, and may I put Mr. Hazelwood on the stand, your

Honor?

THE COURT: Not at this time.

Continue your argument, please.

MR. CHALENSKI: The Government does deny that Mr. Avery was told, during the spring of this year, when he was present at the U.S. Attorney's office and listening to tapes, and reviewing transcripts, that there was only one conversation that his client was a party to. His client was there at this time, that the conversations of his client were played for him.

Mr. Avery was provided with a packet of conversations, as he says, identified by Cioppa, his client English, and Maruca. Those conversations were not specified. In other words, which have Cioppa and English and Maruca specified on them. I did advise Mr. Avery that I would give him that information. He did not request -- I admittedly forgot about it, and I did receive no request from Mr. Avery subject to that request for that information.

With reference to transcripts:

Mr. Avery referred to a bill of particulars

dated May 5th. My response to Mr. Avery dated May 19th, and filed in this court on that date, provides that the Government has made the remaining transcripts, all of the tapes available for inspection and copying by the defendant. I received no demand, your Honor, for -- well, the tapes and transcripts were provided to defense counsel shortly thereafter and I received no demand that they be copied. It is as simple as that.

With regard to the expert's report: There will be another expert testifying at this trial, other than the one that rendered the original report to the Government. That expert has not given me a further written report. He has been reviewing the fact this week, and I have discussed the case orally with him and I have not requested that he provide me with a written report.

It is my opinion that to do that at this time for my use would be senseless, and there is no requirement that it be done just for the defendant's use, in the law.

Mr. Avery this morning pointed

out the transcript to me, and he brought it up with me and told me at that time that his client was not identified on it. The Government did not broach that with him.

I suggest that at some time prior to that, in any event, he determined that his client was not identified on the transcript which previously had been furnished to him. The Government does oppose a continuance in this case. The suggestion that if there is any additional time at all needed to review those transcripts, if there is any time at all needed, that the jury should be picked at this time, and he should be granted a continuance of at most, one day following the picking of the jury, and the trial should commence on Friday.

Thank you, your Honor.

THE COURT: Thank you. Is there anything further, Mr. Avery and Mr. Scaccia?

MR. SCACCIA: Only this, your Honor: I think that if the Court does grant that portion of my motion which requires that we be provided with a written expert's report, that something in the order of at least two

of the interception, which goes to the integrity of the tape recordings, as well as the custody of those recordings that that question should be determined as promptly as possible.

Moreover, Judge, there are other reasons depending on the unfolding of the evidence during the course of suppression. It may be, given the fact that the Government has indicated that there are about 1,800 pages of transcript, it may be that the defense, in the course of its pre-trial preparation, may have to hire experts in order to analyze the original tape in order to check not only as to the manner or -- the manner and method of the recording and of the tapes, and their faithfulness, but also by way of permitting the defense to check the authenticity, and test the authenticity and completeness and accuracy of not only the tapes, but the transcripts involved.

In short, many questions turn on this, and it seems to me that we should be given sufficient time. The only way that can be done is to go forward with the suppression hearing just as promptly as possible so that both sides are protected.

THE COURT: Mr. Chalinski?

MR. CHALINSKI: Well, first the Government did not concede that time is of the essence nor ruge

that the motion be made promptly. What it did state that it, a motion to suppress, because the tapes were not filed immediately or within what definition of what immediately may be established, should be made prior to trial in the case so that the Government can appeal.

Once a jury is empanelled and testimony is started to be entered, then jeopardy is attached and they cannot appeal. That particular problem is avoided by holding a suppression hearing immediately prior to trial which, in fact, has been done in many instances in this District.

Mr. Scaccia seems to get into areas which, at least to me, seem beyond the motion that is raised, and that is one reason that I included the second point that I suggested in my motion that a time for filing further motions in this case, if any are to be filed, be set at this time so that we know exactly what we are talking about.

This case has shown a continual pattern of motions being made, decided, additional motions coming on, which could have been made at the prior time, and having to be re-heard again, and at this particular hearing, we should consent to halt, and I have to call two witnesses that testified at a prior hearing regarding suppression.

So I do urge that an Order be entered by the Court setting a time for making further motions as covered by Rule 12-C, that the motions to suppress be held immediately prior to trial because I will have my witnesses present for trial, and they can testify at the hearing and then just stay here for the trial, itself.

With regard to the unsealing of the tapes at this time, the Government is not so adamantly opposed to unsealing the tapes at any time, but we do urge that consideration be given, that the needs be balanced. The Government has a need to protect the integrity of the tapes and introducing them at trial we have to show that they were sealed properly or if there is no seal, that there is an excuse for the absence of it.

The tapes were unsealed, it was about two weeks ago, and Mr. Dogget was present.

One problem is that the Government has no control over Mr. Dogget, and has not trained him in maintaining custody of such things like that, or of testifying. It is quite likely that Mr. Dogget will have to testify concerning the past incident. We are reluctant to again generate new incidents like that where a non-Governmental agent may have to testify in this case as to the authenticity of the documents during a period of unsealing, without need being shown.

will be disposed of very, very promptly.

I think in the interest of justice and practicality, and judicially, judicial economy, a stay would be appropriate, Judge.

MR. AVERY: On behalf of the Defendant, English, I make the same motion.

MR. SHANNAHAN: I will join in that, too.

MR. CHALINSKI: The Government has to oppose this motion. The issues in the two cases, the one on the issue on appeal and the issues involved in the 142 indictment are distinct. A decision has already been rendered as to the relationship between those and in the appeal the issue on appeal and the instant case last week.

The case is now noted for trial, are old cases, and since last May there have been several motions directed to both suppression and to the indictment.

In December there was a continuance granted until February because of the trial -- because of the calendar situation in February and the case was not reached for trial until late April. That was roughly last week. At that time another motion for a dismissal of the indictment, based upon the speedy trial grounds was raised.

I don't know how long the appeal is going to take in the Masciarelli case. It could take well over

a year, and possibly a year and a half, and I suppose even two.

We don't know what the calendar situation is going to be at the time that that appeal is finally determined. The appeal could be determined in late June when it was not possible or would not be possible to reach the calendar until September.

We have a jury available now, we have Judges available now, and I think that there is no choice, Your Honor, but to move these cases for trial.

THE COURT: Gentlemen, we have already had a motion before the Court with regard to the same issues, or what you, Mr. Scaccia, and you, Mr. Avery, have intended are the same issues that are in that appeal. I think that I denied that motion.

I frankly, at this time, am going to deny the motion and order the McGrath case to trial at two p.m. on the 11th.

MR. CHALINSKI: Thank you.

THE COURT: And with regard to the Masciarelli and English, I am going to order them ready to be tried following the McGrath case.

I think that your position is preserved, Mr. Scaccia, and certainly is on the record. numerous times.

MR. SCACCIA: Speaking for the interest of

fact is that this case was on for November 9, 1976 and a special jury was ordered in here for that purpose, with the knowledge of the Government and defense counsel and as far as I know, no argument to this effect came up and on the 17th, or whenever it was that this Court granted a continuance to today, that the Court said that any motions that defense counsel had to make specifically with regard to what they were talking about on that day could be made by the 22nd or 23rd of November.

This was not one of the motions that was being argued at that time, so that I feel that the motion is not timely and that defense counsel had ample opportunity to the many months before even this Court was appointed, to make that kind of a motion but did not make it. So, I am going to deny that motion.

Now, with regard to the motion for suppression of the evidence educed by the warrant: I find myself in some disagreement with the Broome County Court Judge. It may not be that he and I are talking about the same thing. I suspect that he was talking about a motion to suppress the use as evidence of a quantity of marijuana, and that is a little different situation than we have here.

Also, he totally ignored, I think, the statement at the end of Mr. Hazelwood's, the F.B.I. agent's

affidavit when he stated in Paragraph 20 of that affidavit that he had some evidence that the business had been conducted as late as June 11th, 1974. The Judge in Broome County continued to talk about 55 days which he related back to April of 1974, and therefore I do not agree with his decision, at least in the indictment that we are concerned with here.

So I would deny that. Of course, all of the defense counsel may have an objection to my rulings here.

I feel that this case was adjourned from November 9th, it was set down for trial on that date and I do not know the date before that that defense counsel was advised of those facts, but I would suspect it was before I was confirmed. I suspect that they knew that they were to be ready for trial on that date and, as I recall, they were not ready at that time because one of the counsel was involved in another trial. The case was then adjourned, and as I recall, the case was marked ready by all of the Defendants at that time, and we had several conferences and some of the Defendants pled guilty and this case was then held until today.

I think that under those circumstances the case should proceed to trial at this time.

MR. AVERY: There is one other motion

it.

I have no doubt, personally, about your open mind in this matter, and your fairness, and I want to say that at the outset.

My problem is with regard to the article, and had it been in a newspaper that came out today, that would have been one thing.

JUROR NUMBER TEN: Yes.

THE COURT: So let me ask you: This article was shown to you by one of the members of the general panel. I am not going to ask you who.

JUROR NUMBER TEN: One of the members of the general panel. And I am here and I know you want the truth. I am pretty sure it was Juror Number Twelve, and I don't know his name. We haven't even brushed next to each other at all because I don't know how he feels about it. But I do know after I got halfway through it, I shouldn't have read it, and I don't know nothing, and I can't remember a thing.

THE COURT: Do you know whether it was shown to any other member of the general panel?

JUROR NUMBER TEN: Yes, I am sorry to say.

THE COURT: And do you have any judgment as to how many?

JUROR NUMBER TEN: I would say two.

THE COURT: That you know of?

JUROR NUMBER TEN: That I know of, of course.

THE COURT: And that doesn't include the fellow that showed it to you?

JUROR NUMBER TEN: No.

THE COURT: And without naming any names, all I want to know is were there any comments made about the article, and I don't want to know what they were but just whether there were any?

JUROR NUMBER TEN: I do not remember a comment. The only thing I think I said, I was looking for something about this in the paper, and I must have missed it. If there was a comment, I would be more than willing to tell you about it.

THE COURT: Surely. Do you have any reason to believe that the article was shown to you to prejudice either the Defendants' or the Government's case

JUROR NUMBER TEN: No. I can see -- no, it wasn't discussed and it wasn't anybody saying, "Look, this is what it is all about."

Nobody stuck a gun in my back or anything like that. It wasn't done, I don't think, in that manner.

THE COURT: What you are saying is that the article was shown to you because you made a comment

that you hadn't seen anything?

JUROR NUMBER TEN: I was looking for it in the paper and all of a sudden there it is, and I knew when I got halfway through it and the other jurors said to me afterwards, or the other members of the panel said, "We shouldn't have read this thing."

And I said, "I thought that way, too."

What are you going to do? Like this, and it was all over.

THE COURT: It is a difficult thing to inquire into, but have you any thoughts as to why the article was shown to you, other than your comment?

JUROR NUMBER TEN: No. If there was any reason, after all --

THE COURT: You may smoke, if you wish.

JUROR NUMBER TEN: No, I don't smoke, Your Honor. There was no -- if there was, I can't recall any statement going along with it, and I am here, and I have gone this far, and I will not renege now and say I don't know, if I did know. But I don't know, Your Honor. I respect your position, and mine as a citizen, and the Court, and as you say, the Defendants

THE COURT: Do you think that there is, from your contact with whoever showed this to you, and I am not asking you, or any other people that saw it, that

the defense of this case, or the prosecution of it would be hampered in any way by what was said or shown to you?

JUROR NUMBER TEN: I can see nothing that would hinder going on with this trial. I see nothing to interrupt it or prejudice this case. If I knew, I would be glad to tell you if I was suspicious of anything, and I am not trying to hang anybody and if you want the facts as a citizen, I would be glad to tell you any more, Your Honor, and I would be glad to. It is a hell of a spot to be in and I can see your point, and I thought about it afterwards, and it is no joke.

THE COURT: Well, you don't feel, and I realize that I am inquiring into a state of mind, and so forth --

JUROR NUMBER TEN: Absolutely.

THE COURT: -- rather than actual facts, but you don't feel that the person that showed it to you was trying to prejudice you one way or the other?

JUROR NUMBER TEN: No, no.

In fact, as I say, this gentleman is out in the hall, and I stayed away from him because I thought that he might want to discuss it further. I purposely stayed away because I thought I was embarrassing him if he was called upon to produce the article; do you see what I mean? I didn't want to embarrass this man. I

don't know, and as I said, Juror Number Twelve.

THE COURT: But there were no further discussions about this?

JUROR NUMBER TEN: No comments. There were none. Well, nothing. We did not go into it, and even this other juror, this man that you have seen me associated with out there, the only thing we said or he said to me, you know, "We shouldn't have read this."

THE COURT: That wasn't the fellow that showed you the article?

JUROR NUMBER TEN: No, sir; no, Your Honor, it was not.

THE COURT: Well, let me ask you one other thing.

JUROR NUMBER TEN: Yes, sir.

THE COURT: The reading of that article, did that do anything to your state of mind insofar as the trial of this case?

JUROR NUMBER TEN: As I told you, as you questioned me in front of everybody, it still remains the same. I know nothing, and I am not prejudiced because it is a gambling case or a case involving gambling and it doesn't make any difference to me. I know nothing, and I am going -- I intend to go through with an open mind, and that is what I intended to do but, I mean, up to this point

I agreed, and that is my own mind, and it is not influencing me one bit.

THE COURT: Let me ask you one other thing: Your recollection of what the article said, can you tell us for the record what it said?

JUROR NUMBER TEN: This is crazy, but I went down through this thing because I think I got halfway down and my mind said, "Dick, you shouldn't be reading this thing."

I remember about \$10,000, and I remember several names, and it had something to do with gambling, and if you got the Bible out, I will put my hand on it right now.

THE COURT: That you do not recall the names?

JUROR NUMBER TEN: No, sir, I don't. I don't even recall one name, and I don't know that --

THE COURT: And even if your recollection was refreshed as to those names, and later during the trial they came to you as having been in the article, would that influence you?

JUROR NUMBER TEN: It certainly would not, and I am still sticking to my conviction that it would not, so help me. I am not protecting anybody. I am just telling you the truth.

THE COURT: Well, I believe you. There is no reason for me not to believe you, and as I said earlier, my sole interest is not to try the case again.

JUROR NUMBER TEN: I understand that, and I realize that. I realize that, and as I think about it, I put you in one hell of a spot, frankly speaking, in the system.

THE COURT: Both sides are entitled to fair jurors, and you think that you could be one?

JUROR NUMBER TEN: I have served before in this County before, and I am sure that I would be.

THE COURT: I am merely concerned that we have to work in the interest of justice, and I would like to save the taxpayers some money once in a while.

JUROR NUMBER TEN: I have no doubt that you do, and I admire you for it.

THE COURT: Well, I thank you for being so honest.

JUROR NUMBER TEN: I have not a darn thing to hide.

THE COURT: I am sure that you don't.

JUROR NUMBER TEN: I don't have anything to hide, I really don't. If this is the place --

THE COURT: I should say that I am going to have to discuss what you just told me with the United

States Attorney.

JUROR NUMBER TEN: All right.

THE COURT: And with the defense counsel.

JUROR NUMBER TEN: Yes.

THE COURT: I would appreciate it if you would not discuss what you and I have talked about with any other members of the jury.

JUROR NUMBER TEN: I am in this far enough, without doing anything more. You can trust me on that.

THE COURT: I think that it is your impression, from what went on, that there would be no prejudice to either side as a result of what happened today with regard to that article?

JUROR NUMBER TEN: None, none from me, none whatsoever, nor do I have any evidence that anybody else would be prejudiced.

THE COURT: And from what you have seen, you would not think that anyone else would be?

JUROR NUMBER TEN: To the best of my knowledge, there was no discussion on the thing. So if we had gotten together in the corner and said that this is what it is about, and that all of the time, and look at this guy, but we never got into that. There was no gossip or any nitpicking or brain picking at all, and it was

just like a football score, and you read them both. But nothing that I should have gotten from it, that I recognized.

THE COURT: Well, I think, again, I should thank you for being so kind as to come in here and also for serving on the jury, in general.

JUROR NUMBER TEN: I certainly, I regret very much that this had to happen, but I am glad that I am able to contribute what little

I mean, I am not trying to hind behind any statement or anything like that. I mean, I have been pretty close to the law, and my mother was one of the first Court Attendants appointed in Onondaga County, and Mrs. Laura Bond, and she was with the County for 32 years, and I have a respect for the law, and I have a Court Judge in the family, and that is Judge Saunders, and so I certainly am not going to get hung that way, as you might say.

So if there was anything else, I could tell you, for the record, and I would be glad to do it, but I cannot think of anything, and as I say it was like this, boom boom, and it was all over as far as I was concerned.

THE COURT: All right.

JUROR NUMBER TEN: I did not hand it back

to Juror Number Twelve. I handed it back to somebody else, who said he would see that he got it. I did not personally go back and say, "Thanks a lot, I was glad to read this," and all of that stuff that might have gone into it. If this person was trying to say, influence me, he might have said, "I want to show you something," but here there were other people, two people with me, or in the area at that time.

THE COURT: And it was in response to your statement that you had not read anything about it?

JUROR NUMBER TEN: As far as I can gather on this thing, the way the facts are in my mind at the present time. If this man had said, "I would like to see you, come over here and I want to talk to you a moment," I would certainly be smart enough then because I read the book, and this is not the first -- this is the first time I have read the book here in this Court, but I would report it to this gentleman or the Marshall, or directly to you, and preferably I would ask to see you, really. That is what I would have done if somebody said to me, "Look, what do you think?"

THE COURT: But at that time you thought it was innocent?

JUROR NUMBER TEN: I beg your pardon?

THE COURT: You thought it was innocent?

JUROR NUMBER TEN: I still think it was done innocently, because nobody said anything to me. Don't you think if somebody was trying to influence you that they would discuss it a little bit? I would think so if I was trying to influence somebody, and trying to sell them a bill of good, I would say.

THE COURT: All right. Well, I think that you have been open and honest with us, and I don't see any reason to keep you any longer.

As a matter of fact, Mr. Dogget, I don't see any reason to keep the general panel.

THE CLERK: All right.

THE COURT: Thank you for coming in.

(Whereupon, the discussions in chambers were concluded at 5:20 p.m. and Court was adjourned until the following morning.)

of the other defendants; any transcript which the Government intends to use, any -- any transcripts of any tapes which the Government intends to use, and again we will offer in open court to pay for these, even though I am as assigned attorney.

MR. CHALENSKI: Your Honor, Mr. Avery's response -- well, Charles W. Avery prepared an application for discovery and other relief, and it is undated, and the notice of motion to which it is attached is dated May 14th, 1976, in which he requests an order directing that the defendant be furnished with a complete verbatim copy of transcripts of any conversation allegedly seized under the authority of the order issued in this case.

Now, this goes on that Arthur Chalenski, United States Attorney now in charge, has furnished the defendant with a transcript of the conversation which purports to have been participated in by him, but refused to furnish a copy of the other transcripts which have been prepared by the United States Attorney's Office in preparation for the trial of this action unless this defendant pays

for the same.

The sole issue appears to be: Who is to do the copying, and who is to pay for the same. The cost of photocopy reproduction will be reimbursed to me and as an assigned attorney, and it goes on to say that he will advance the cost.

The whole issue on the transcript, your Honor, was the cost.

THE COURT: Well, gentlemen, I am sorely disturbed with the developments in this action. I think that all of you knew that a special jury panel had been ordered into this court at Syracuse on November 9th, and in the anticipation that there would be a judge sitting here at that time, even though at the time that the jury was ordered in, no judge had been appointed. Nor had anybody volunteered to come out of any other district to come up here and sit at that time, as far as I know.

As you know, the case on November 9th was adjourned because of some prior commitments of some of the other attorneys that were involved in this case.

The case has been adjourned from day to day this week, and not entirely the fault of defense counsel, but every time that the case has been called, and my recollection is, even on November 9th, with the exception of one or two attorneys, not including those here present, the case was marked ready by everybody. It is unusual, to say the least, that now, on the 19th of November it is not ready, after having been ready for at least 8 or 9 days, and after the notice that has been provided to them.

The courts in this nation do not wish to prejudice the defendants' rights, of course, and our charge was the duty to protect those rights.

Likewise we have a duty to protect the general public, and it is difficult, in this situation, to know what to do along that line.

I suspect that all of the counsel who have spoken believe what they say to be true. I frankly find it very difficult to see where the Government would

retain a second expert who would say something different than the first one. I frankly don't see why you need a second expert, if the first one isn't dead. I frankly do not see why you have conversations with your defendant, why he or the defense counsel cannot ferret out from those conversations who said what to whom, and when.

However, it does seem to me that it will not prejudice or unduly delay justice, if we do have a slight continuance in this action. I understand Mr. Chalenski's suggestion, but I must say to Mr. Chalenski that, as perhaps everyone here knows, this Court will not be sitting here in Syracuse on November 22nd, and next Monday, and the 25th is Thanksgiving, and I would not expect to call a jury back on next Friday.

In view of all of the arguments and the facts and circumstances given here, and I am very disturbed to do this, I am going to grant a continuance until November 29th, which is a week from Monday. I would request, and the only motion that I am granting right now is the motion for a continuance.

TRANSCRIPT OF HEARING Held November 17, 1976.

I would request that any motions directed toward whether this case can be prepared to go to trial on November 29th are to be submitted to this Court no later than November 23rd.

And I will decide then by the 24th or the 26th of November, and I would request that counsel try to refrain from anything new and this case is clearly old, and I would think that defense counsel, and prosecution would both understand their cases by now, and that there wouldn't be any need for any new motions, and that, in fact the motions be limited to what has been said today.

I cannot, I think, do any better for either side than that. And as it stands, even now, I am going to have to apologize to this jury that has been here since the 9th of November expecting to be called, and to try at least part of this case.

MR. CHALENSKI: Thank you.

MR. AVERY: Thank you.

MR. SCACCIA: Thank you.

THE CLERK: Court stands in recess

TRANSCRIPT OF HEARING Held January 3, 1977.

termination of the order?

BY MR. SCACCIA: Objection. Object to the form, it is leading and doesn't get right to the heart of the issue--it's leading and suggestive.

BY THE COURT: All right gentlemen, I think it is leading and suggestive; can you ask him what he knew about the statute?

BY MR. CHALENSKI: I did.

BY MR. SCACCIA: I have no objections to that question.

BY MR. CHALENSKI (Continuing):

A What did you know about the statute at that time in connection with the filing, or--excuse me--sealing of the tapes?

A What I had been told by the Assistant United States Attorney in charge of the case.

Q What were you told?

A I was told by the Assistant Attorney Eugene Welch it was incumbent upon me to insure that they would be duplicated within the shortest period of time as possible and taken immediately thereafter to the judge.

Q Were you told anything with regard to the definition of "immediately"?

A Specifically, within--

BY MR. SCACCIA (Interrupting): Excuse me--yes or no, that permits a yes or no--excuse me, Your Honor--objection--unresponsive.

BY MR. CHALENSKI (Continuing):

Q Mr. Hazelwood--

BY THE COURT (Interrupting): Would you repeat the last question?

(WHEREUPON THE FOLLOWING QUESTION WAS READ BACK AS FOLLOWS.)

"Q Were you told anything with regard to the definition of "immediately"?

BY THE WITNESS: Specifically, no."

BY MR. CHALENSKI (Continuing):

Q Did you give any instructions to any person who received the tapes from you concerning their sealing?

A I did.

Q What did you tell them?

A I instructed them to transport them to the F.B.I. Office in Albany, New York, with the duplicating equipment to cause them to be duplicated, and immediately thereafter or as soon as possible and to be transported to Judge Port for proper sealing.

BY MR. CHALENSKI: No further questions, Your Honor.

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THE COURT: So do I, and if you want to attack the credibility of the F.B.I. at the trial of the case in chief, of course you are going to be permitted to do it by whomever is the Trial Justice, but at this time I think it is out of bounds.

Thank you.

(Witness excused.)

MR. CHALENSKI: The Government calls Special Agent Richard Shearer.

RICHARD SHEARER,
called as a witness by the Government, being first duly sworn, was examined and testified as follows:

THE COURT: Mr. Chalenski, I would request the Government at this time to make an offer of proof as to what Agent Shearer is going to say with regard -- you can name the exhibits, I would request an offer of proof from you.

MR. CHALENSKI: Your Honor, Agent Shearer is going to testify that he had in his possession Government Exhibits 14A and 14B, 14C, one of two, 14C, two of two.

MR. AVERY: We cannot hear.

MR. CHALENSKI: 14--

THE COURT: Start again.

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MR. CHALENSKI: The Government is going to offer proof that Agent Shearer received in his possession Government's Exhibit -- had in his possession Government's Exhibit 14A; 14B; 14C, one of two; 14C, two of two; 14D through 14K; and 14L, one of two; and 14L, two of two, on March 21, 1974, that he subsequently, on March 22, 1974, received Government Exhibits 14M and 14N from Special Agent Hazelwood, that on March 22, 1974, he received Government Exhibit 14-0 from Special Agent Joseph Riley, that on March 22, 1974, he carried all of those exhibits to Albany, New York where he personally made duplicates of each recording of it subsequently, and on March 25, 1974, Special Agent Hazelwood transported all of those tapes to Judge Port for sealing.

MR. SCACCIA: Did you say Hazelwood or Shearer?

MR. CHALENSKI: Special Agent Shearer took them to Judge Port for sealing.

MR. SCACCIA: On the 25th?

MR. CHALENSKI: That is correct.

THE COURT: Let me ask you, the defense counsel, do you have any objection to the Court accepting that offer of proof?

MR. SHANAHAN: I do not, your Honor.

THE COURT: Mr. Avery?

MR. AVERY: May I have a moment?

No, I have no objection to the offer of proof subject to our right to cross-examine.

THE COURT: Of course.

MR. SCACCIA: I have no objection, your Honor. I am just trying to get to the heart of the matter.

THE COURT: Is there anything --

MR. CHALENSKI: I should add two items, your Honor --

THE COURT: Wait a minute. Up to there, then, the Court will accept the offer of proof. Now you may add your two items.

MR. CHALENSKI: That during the time that Agent Shearer had possession of the tapes, as I have just related, and he did not handle them in any way except to duplicate them and that during the time he had them, the original tapes were not altered in any manner.

THE COURT: Gentlemen, what he is saying is that if Agent Shearer were asked those questions, he would state the answer as Mr. Chalenski has just said it. I am not asking you to say -- to admit the

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truth or falsity of that, merely that the agent would state that that was so.

MR. AVERY: The questions -- the offer of proof includes statements which, if asked in question form, would be conclusions and objectionable on that basis.

THE COURT: Not at all. "Did you do it or didn't you do it?" that is not a conclusion, that is an act.

MR. AVERY: As far as altering --

THE COURT: He is saying that he did not alter them, isn't that part of it?

MR. AVERY: Your Honor, there is a considerable question only as to whether, in the making of copies, there can be any "alteration" by virtue of having a copy made. This is part of expert testimony which may or may not --

THE COURT: Well, you may cross-examine on that.

All right, then we will -- that last two propositions you may inquire about, Mr. Chalenski.

DIRECT EXAMINATION

BY MR. CHALENSKI:

Q Special Agent Shearer, during the period of time that you had custody of these tapes until the time that you

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For the Government - Richard Shearer - Direct

delivered them to Judge Port, did you handle them?

A Yes, I did.

Q And where did you handle them?

A Back at Albany.

Q And what did you do with them?

A I duplicated the tapes.

Q Did anybody else handle the tapes during the time period that you had --

A No, sir.

Q -- custody of them?

A No, sir, they didn't.

Q And did you alter the original tapes in any manner?

A No, sir, I didn't.

MR. AVERY: Objection as calling for a conclusion without sufficient foundation. He should testify as to what he did, not whether the tapes had any alteration as a result of what he did.

THE COURT: No, I disagree with you, Mr. Avery. Now, if somebody brought a tire into my garage and I put it on another car, I can tell you whether I altered it or not by sticking a screwdriver in it and I do not see anything different about a wiretap. Now -- no, it may stand, it is not a conclusion, it is a fact.

MR. CHALENSKI: Thank you, your Honor.

You may cross-examine.

THE COURT: At least it is testified to
as a fact.

You may cross-examine on it.

CROSS-EXAMINATION

BY MR. SCACCIA:

Q Agent Shearer, can you tell the Court as to whether you had familiarized yourself with the F.B.I. manual which was in existence at just before the intercept period you just testified to, with respect to the recorded intercepted communications?

A No, I didn't.

Q Are you now familiar with the portions of the F.B.I. manual as they relate to the recording of the intercepted communication and particularly with respect to the matter of the custody of the original recordings after the expiration of the period of the order?

A I am now, yes.

Q And when did you first become familiar with the F.B.I. -- excuse me, and I take it that those instructions are in writing, are they not?

A They are, right.

Q And when did you become familiar with the written instructions by the F.B.I. with respect to the handling

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BY MR. SCACCIA:

A Yes, sir, I am now.

Q Now, can you tell the Court as to whether the full manual, of which of course the Defendants' P in evidence is a portion, is a document available at the Albany headquarters of the F.B.I.?

A Yes, it is.

Q And has been available to not only you as an agent but to other special agents, particularly those having to do with the discharge of functions involving wiretap interceptions, correct?

A Correct.

Q And isn't it also correct, Agent Shearer, that agents assigned to duties involving wiretap interception, F.B.I. agents, that is, are required to familiarize themselves with all of the pertinent and the relevant manual instructions and other written instructions existing at the time of the assignment by an agent to wiretap duties?

MR. CHALENSKI: Your Honor, I am sorry, I am not sure I can even object to that question. I just did not understand it, if it can be broken up into some parts.

THE COURT: Let us find out if the witness understood it. What he is asking you, is it a

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fact that F.B.I. agents are required to familiarize themselves with these type of documents?

THE WITNESS: Yes, sir, they are if they are on monitoring duty, if they are going to monitor.

BY MR. SCACCIA:

Q And do you say, sir, that with respect to the period March 21, 1974 through March 25, 1974 that you were or were not involved in monitoring duties as a Special Agent?

A No, I wasn't.

Q How do you describe to the Court your duty and function with respect to the wiretap interception in the period that I have just asked you about, March 21

MR. CHALENSKI: Objection.

MR. SCACCIA: Let me finish.

BY MR. SCACCIA:

Q (Continuing) -- March 21 through 25, '74?

THE COURT: He is going to describe what he thinks he was --

MR. CHALENSKI: Oh, all right.

BY MR. SCACCIA:

A I was a surveillance agent.

Q Involved in a wiretapping session pursuant to a Court order, correct?

MR. CHALENSKI: Your Honor, is his question

TRANSCRIPT OF HEARING Held April 7, 1977.

115 || For the Government - William Gilman - Cross

Q Were you present when he began to duplicate the tapes?

A Yes, I was.

Q Where was this being done?

A In a room at the F.B.I. Office in Albany.

Q Do you know what day and -- do you know what day?

A No, I could not recall that.

Q And do you know what date?

A No, I don't recall..

Q Was it the same day that you arrived in Albany, if you remember?

A I don't recall.

Q Was all of the duplication completed within one day?

A No, it was not.

Q How many days did it take?

A I don't recall -- I don't --

Q How many days were taken for the purpose of duplicating?

A I don't recall.

Q Do you know whether the duplication process continued for all of the first day?

A I don't recall.

Q For how long a period were you actually physically present in the room when the duplication was being made?

160 || For the Government - Ronald W. Palmer - Cross

during this process?

A None to my knowledge.

Q And you were present during all of the duplicating which was done?

A That is correct.

Q And he made no adjustments or technical adjustments of any kind during that period?

A Other than adjusting the volume or speed for his machine.

Q Do you know if he has had any technical training in this area?

A No, he hasn't.

Q Can you give us any idea of the total number of hours or continuous operation which occurred during this period?

A I can only give you an estimate, and it is just an estimate. Of working hours? I would say close to 40 hours, maybe -- you know, a few hours one way or the other and I am only giving an estimate.

Q And during this 40-hour period, would you work straight through for an eight-hour day?

A That's correct.

Q And then take a break for the evening and go for another eight-hour day, is that correct?

A If the tapes were there. There were some days that

59 || For the Government - Richard Shearer - Cross

BY MR. AVERY:

Q Now, when you rewound it, did you use high-speed or low-speed for rewinding purposes?

A I don't know.

Q O.K. And that is true -- would that be your answer if I asked you the same question with regard to each of the original tapes?

A Yes, sir.

Q And would your answers as to reproducing or duplicating each of the tapes be the same if I asked you the same questions that I have just asked you about this one?

A Yes, sir.

Q All right. Now, you did each tape in turn, is that correct?

A Yes, sir.

Q And you put each original tape back in the original box from which it came?

A Yes, sir.

Q And when this was completed, did you then take the tapes, the original tapes, to Auburn?

MR. CHALENSKI: Objection, your Honor. It has been answered several times.

THE COURT: It has that.

MR. AVERY: Well, your Honor, there was a

TRANSCRIPT OF HEARING Held April 6, 1977.

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For the Government - Richard Shearer - Cross

period of three or four days, I believe from March 21 or 22 until March 25. I would like to have the time fixed when he completed the -- when he did the so-called copying or duplicating and when he left Albany to come to Auburn.

THE COURT: He left Albany to go to Auburn on the 25th.

MR. AVERY: On the 25th?

THE COURT: Right. If you want to know anything else, ask him.

BY MR. AVERY:

Q When was the copying done?

A It was sometime during that weekend.

Q You arrived in Albany on the 22nd of March?

A Yes, sir.

Q What day of the week was it?

A It was a Friday, I believe.

Q Did you do anything, duplicating on that day when you got to Albany?

A Yes, sir, I did.

Q Did you complete it on that day?

A No, sir, I didn't.

Q When did you complete the duplicating?

A I can't recall. It was sometime during that weekend that I finished up.

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Q You do not know whether you did it on Saturday or not?

A I did some on Saturday, but I can't recall if I went into Sunday, but I know I did finish up on that weekend.

Q Were you the only one participating in the duplicating process?

A Yes, sir, I was.

Q And the only one who had possession of the tapes?

A Yes, sir.

Q And immediately upon the completion of your duplication, you then delivered these tapes to Auburn, is that correct?

MR. CHALENSKI: Objection, your Honor, conclusion.

THE COURT: No, you may answer.

BY MR. AVERY:

A That is correct.

Q Is that correct, immediately upon the duplicating process being finished?

A Yes, sir.

Q And that was on the 25th. What day of the week was the 25th?

A I think it was a Monday.

Q Did you do any of the duplicating on Monday?

A I can't recall.

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Q Did you do any of the duplicating on Sunday?

A I can't recall that, either.

Q How long did it take you to complete one tape, the duplication process for one tape?

A I really don't know.

Q Now, did you make a log or did you make any notes with respect to this duplication process?

A No, sir, I didn't.

Q Did you make any report or summary of what you had done upon the completion of this duty?

A No, sir, I didn't.

Q You made no transcripts of the original tapes?

A No, sir, I didn't.

Q Where did you keep the original tapes during the periods of time when you were not using them?

A They were locked in a filing cabinet in our technical room.

Q Do you have a key to that filing cabinet?

A I did at that time, yes, sir.

Q And did you have the only key?

A Yes, sir. Yes, sir.

Q There was just one key to a filing cabinet?

A That filing cabinet, yes, sir.

Q Did you have any other duties in Albany other than the duty of duplicating these original tapes?

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MR. CHALENSKI: Your Honor, while we are waiting for Agent Gilman, I move that the tapes in MP 15 box be resealed at this time.

(Mr. Chalenski sealing box.)

THE COURT: Well --

MR. AVERY: I have no objection, but I would also ask that the exhibit which was originally found in that box be also returned to it.

THE COURT: It is there and we will seal it with it.--

MR. AVERY: Thank you, your Honor.

THE COURT: -- at the conclusion of the case today.

While we are waiting for Agent Gilman, Mr. Chalenski, can you give us an off of proof as to what he is going to testify to?

MR. CHALENSKI: Yes, your Honor.

Agent Gilman is going to testify that he had in his possession the tapes 14P through 14Z and that includes 14U, one of two; -U, two of two; -X, one of two and -X, two of two; and tapes 14AA through 14RR and that includes two sets of 14PF, one of two and two of two; II, one of two and two of two; KK, one of two and two of two; and LL, one of two and two of two, in his possession on April 25, 1974, that he

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ultimately delivered those tapes on May 3, 1974 to Judge Port, that during the time he had those tapes he transported them to Albany, New York and that during the time that they were in Albany, New York, he supervised and directed the copying of those tapes, that while they were being copied, he was present for a portion of the time. Special Agent Ronald Palmer did the copying, physically manipulated the machines, that during the period of time he had the tapes, they were not handled by any -- the original tapes were not handled by any person other than himself and Mr. Palmer, and that the original tapes were not altered in any manner during that period of time.

THE COURT: All right. And that custody, with regard to Agent Gilman, is shown in Exhibit 17?

MR. CHALENSKI: Yes, your Honor.

THE COURT: Some portion of Exhibit 17?

MR. CHALENSKI: There is an Exhibit 17 which relates to each day's tape, your Honor.

THE COURT: Yes.

Any objection to the Court receiving the offer of proof from the Government with regard to Special Agent Gilman?

MR. SCACCIA: No, your Honor.

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MR. SHANAHAN: No, your Honor.

MR. AVERY: No, your Honor.

WILLIAM GILMAN,

called as a witness by the Government, being first duly sworn, was examined and testified as follows:

THE COURT: Mr. Gilman, since you were not here during all of what Mr. Chalenski said, it generally followed the custody and control that you had of certain exhibits that are involved here and there was no objection from any of the counsel as to what your testimony would be with regard to that custody and control.

THE COURT: All right, Mr. Scaccia.

CROSS-EXAMINATION

BY MR. SCACCIA:

Q Agent Gilman, can you tell us if you have with you any of your reports relating to this time period which you had the custody of pursuant to the offer of proof the Court just described?

A No, sir, I don't.

MR. CHALENSKI: Your Honor, I have copies of two, 302 forms which are similar to those produced by Agent Shearer.

THE COURT: Why don't you show it to counsel?

(Mr. Chalenski showing documents to Mr. Scaccia.)

MR. SCACCIA: If I may just take a moment, your Honor, or a little bit longer.

THE COURT: Surely.

MR. CHALENSKI: Your Honor, perhaps, and I hesitate to interrupt, but Special Agent Gilman was also going to testify that the tapes in MP 17, which is the entire set of tapes in the next wiretap, and perhaps I should repeat the same offer of proof but just change the dates and the cross-examining can continue as to both of those.

THE COURT: Well, wait 'til they look at the two pieces of paper that you handed to them and we shall see.

Mr. Scaccia:

MR. SCACCIA: Yes, sir?

THE COURT: You mentioned to me earlier that you had some difficulty this evening.

MR. SCACCIA: I do have.

THE COURT: I would suggest at this time that we have Mr. Chalenski make another offer of proof through Agent Gilman. Can the agent be back in the

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morning?

--- MR. CHALENSKI: Yes, your Honor.

THE COURT: All right, why don't you make the offer of proof with regard to MP 17.

MR. CHALENSKI: Your Honor, just -- it is the identical offer of proof except that he had the tapes -- well, excuse me, this was with reference to Tapes 14SS through 14ZZ; and 14AAA through 14HHH, that he had those tapes in his possession on May 15, 1974, that he delivered them to Judge Port -- excuse me, your Honor, that was May 13, 1974 and that he delivered them to Judge Port on May 21, 1974. All the other aspects on the offer of proof would be identical.

MR. SCACCIA: I have no objection to the offer of proof.

MR. AVERY: No, I have none.

THE COURT: Mr. Shanahan?

MR. SHANAHAN: None.

THE COURT: All right, it is received as if the agent had testified to it.

--- Now, Mr. Chalenski, you have given to Mr. Scaccia, and I assume that he will share them with the other two counsel, Form 302, is it?

--- MR. SCACCIA: That is correct, your Honor.

Q Was that one source or more investigation from the F.B.I.'s viewpoint?

A That was one operation in the phase of the investigation.

Q Now, who were the subjects in connection with the underlying investigation for each of the three wire tap applications?

A Frank Cannone, Stanley Reppucci, Jon English, Roger Evanick, Raymond Mascarelli, Joyce Evanick, Joseph Maruca, Thomas Abbadessa, James McGrath, Thomas Gaetani.

Q I'm asking you now --

BY MR. SCACCIA (Interrupting): I object, Your Honor, we are entitled to a full answer by this witness.

BY THE COURT: Yes, you may conclude your answer.

BY THE WITNESS: And several unidentified individuals who used aliases or code names during the gambling transaction.

BY THE COURT: Ask your next question.

BY MR. CHALENSKI (Continuing):

Q Were those individuals subjects of each intercept?

A Only the initial intercept.

Q Are the subjects in that initial intercept set forth in your affidavit in support of it?

A They are.

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Q And in the third intercept set forth in your affidavit in support...

A There were persons who were involved in the gambling operation who were at that time not identified by our agent.

Q And, some of the persons identified were identified by codes or other aliases, but not by true names?

A Correct.

Q Now, following the completion--excuse me--when did the intercept terminate for the first intercept beginning on March 7, 1974?

A It terminated 2:15 P.M. on March 21, 1974.

Q What, if anything, did you do following that date in connection with this second intercept?

A We reviewed the notes and--

BY MR. SCACCIA: (Interrupting): Objection, the witness was asked what "he" did.

BY THE WITNESS: I reviewed the notes with the other F.B.I. Agents who have been working on the case with me, and then, presented my request to the Assistant United States Attorney that we be allowed to submit an affidavit in support of a judicial wire tapping.

BY MR. CHALENSKI (Continuing):

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Q How long did that review take?

A Approximately, one week.

BY MR. SCACCIA: I'm sorry?

BY THE WITNESS: Approximately, one week.

BY MR. CHALENSKI (Continuing):

Q And, following that review and recommendation, what if anything happened?

A Then a request was prepared by the Assistant United State Attorney and submitted to the Department of Justice for consideration and review; upon the passing of approximately ten days the Department concurred with our request and authorized us to approach the Honorable Edmund Port at our request.

Q What, if anything, happened then?

A Prepared the necessary paper work in support of our request and went to Judge Port and he authorized a second wire tap.

Q And, did that take place on April 11, 1974?

A That is correct, he signed the authorization 10:30 A.M.

Q Following the completion of the second wire tap, what date did the second wire tap finish?

A April 25--8 P.M.

Q What, if anything, did you do at that time in connection with the third wire tap?

A We followed the same procedure as we had in the past,

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as I have just described and again went to the Assistant United States Attorney, who submitted the necessary documents to the Department of Justice for concurrence, which was incidental, and approached Judge Port.

Q Did the same time period elapse?

A Approximately same period.

Q During the time of these interceptions and until the time each order was sealed and that would be up until May 21, 1974, were you aware the statute required that these tapes be sealed immediately upon completion of the order period?

BY MR. SCACCIA: Objection.

THE COURT: Yes, sustained.

BY MR. CHALENSKI: Your Honor, may I be heard?

THE COURT: Yes.

BY MR. CHALENSKI: Your Honor, the case of United States versus Poeta--

BY MR. SCACCIA (Interrupting): Excuse me, could we have a citation?

BY MR. CHALENSKI: Case 455 Fed. 2d--

BY MR. SCACCIA: What is the name?

BY MR. CHALENSKI: The United States versus P-o-e-t-a.

GOVERNMENT'S COMPUTATIONS OF TIME UNDER VARIOUS
NORTHERN DISTRICT PLANS.

COMPUTATION OF TIME

Various Northern District Plans

<u>Date</u>	<u>Days</u>	<u>Category</u>
<u>PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES, Effective April 1, 1973</u>		
11/18/74-12/10/74	21	Excludable
<u>Reason:</u> Rule 5(a) - "Period of delay while proceedings concerning the defendant are pending." The first available motion day for arraignment was Monday, December 9, 1974. A crowded calendar caused arraignment on December 10, 1974.		
12/10/74-1/13/75	34	Excludable
<u>Reason:</u> Rule 5(a) - Pretrial motions pending.		
1/14/75-3/4/75	56	Non-excludable
<u>Reason:</u> Government attorney ill with infectious hepatitis. Government fails to complete discovery.		
3/4/75-5/4/75	60	Excludable
<u>Reason:</u> Rule 5(b) - Defense request that case be put over to May-June trial term.		
5/5/75-5/7/75	3	Non-excludable
5/7/75-9/28/75	144	Excludable
<u>Reason:</u> Rule 5(a) - Interlocutory appeal to Second Circuit. Also, Rule 6(b) since defense counsel consented to stay of proceedings pending appeal (Gov A 35).		
<u>Totals</u>	259	Excludable
	59	Non-excludable

THE INTERIM PLAN PURSUANT TO THE PROVISIONS OF THE
SPEEDY TRIAL ACT OF 1974, Effective September 29, 1975

9/29/75-3/24/76	177	Excludable
<u>Reason:</u> Rule 5(a) - Interlocutory appeal to Second Circuit. Also, Rule 6(b) since defense counsel consented to stay of proceedings pending appeal (Gov A 35).		
3/2/76-5/4/76	42*	Excludable
<u>Reason:</u> Rule 6(b) - Defense request that case be removed from Albany trial calendar. Judge Foley makes a specific ruling that this time is excluded (Gov A 36-38).		

*Overlaps 20 days
with prior period

GOVERNMENT'S COMPUTATIONS OF TIME UNDER VARIOUS
NORTHERN DISTRICT PLANS.

COMPUTATION OF TIME - Various N.D. Plans

<u>Date</u>	<u>Days</u>	<u>Category</u>
5/4/76-5/12/76	8	Non-excludable
5/13/76-5/24/76	11	Excludable
<u>Reason:</u> Rule 6(a) - Defense motions for suppression, returnable May 24, 1976 at Utica, New York.		
5/24/76-6/1/76	8	Excludable
<u>Reason:</u> Rule 6(a) - Defense motions for suppression and hearings. Hearing begins on May 28, 1976 before Hon. Lloyd F. MacMahon in Auburn, New York and continues on June 1, 1976.		
6/1/76-6/30/76	44	Excludable
<u>Reason:</u> Rule 6(a) - Motions <u>sub judice</u> since Judge MacMahon reserved decision on June 1, 1976.		
<u>Totals</u>	282	Excludable
	8	Non-excludable

PLAN FOR PROMPT DISPOSITION OF
CRIMINAL CASES, Effective July 1, 1976

7/1/76-7/14/76	14	Excludable
<u>Reason:</u> Rule 6(a) - Motions <u>sub judice</u> since Judge MacMahon reserved decision on June 1, 1976. 18 USC §3161(h)(1)(G)		
7/14/76-9/20/76	66	Non-excludable
<u>Reason:</u> No trial terms available in N.D.N.Y.		
9/20/76-11/9/76	49	Excludable
<u>Reason:</u> Rule 10 - 18 USC §3161(h)(8)(A) - Defense counsel unavailable. Attorney Scaccia is hospitalized and attorney Boreanaz is engaged in trial. Judge Port grants continuance "in the interests of justice" (Gov A 39-41).		
11/9/76-11/29/76	20	Non-excludable
11/30/76-12/20/76	20	Excludable
<u>Reason:</u> On November 30, 1976, a mistrial was declared against English and Masciarelli because of misconduct of a prospective juror which affected the entire panel. Counsel for Masciarelli and English request "... that the case be continued ... and specifically waive any requirement that we be retried within 60 days." (Tr. November 30, 1976, pp. 3,4.) Judge Munson grants defendants'		

GOVERNMENT'S COMPUTATIONS OF TIME UNDER VARIOUS
NORTHERN DISTRICT PLANS.

COMPUTATION OF TIME - Various N.D. Plans

<u>Date</u>	<u>Days</u>	<u>Category</u>
motion for continuance ". . . in the [interests] of justice". Judge Munson grants a continuance to February 14, 1977. Defense counsel do not object to the February 14, 1977 date.		
12/21/76-1/21/77	31	Excludable
<u>Reason:</u> Defense motions for suppression and hearings. Hearings held on January 3, 4, 7, 10 and 21, 1977. Also, defense counsel <u>consent</u> to continuance to February 14, 1977. 18 USC §3161(h)(1)(E) and (h)(8)(A).		
1/22/77-2/14/77 ¹	24	Excludable
<u>Reason:</u> 18 USC §3161(h)(1)(E). The evidentiary hearings requested by defense counsel were incomplete. Also, 18 USC §3161(h)(8)(A) since defense counsel <u>consent</u> to continuance to February 14, 1977.		
2/14/77-3/1/77	14	Excludable
<u>Reason:</u> 18 USC §3161(h)(1)(E). The evidentiary hearings requested by defense counsel were incomplete.		
3/1/77-4/5/77	36	Excludable
<u>Reason:</u> 18 USC §3161(h)(1)(E) and (h)(8)(A). On March 1, 1977, Judge Foley made a specific finding that this period was excluded under §3161(h)(8)(A).		
4/6/77-4/11/77	6	Excludable
<u>Reason:</u> 18 USC §3161(h)(1)(E). Continuation of defense requested hearing on pretrial motions.		
4/11/77-4/18/77	7	Excludable
<u>Reason:</u> 18 USC §3161(h)(1)(E). On April 11, 1977 defense counsel Scaccia made and served a motion. Judge Munson gave the Government one week to respond.		
4/18/77-4/27/77	9	Excludable
<u>Reason:</u> 18 USC §3161(h)(1)(G). On April 11, 1977 Judge Munson said he will decide the motions "on or before the 27th of April".		
4/27/77-5/11/77 ²	14	Excludable
<u>Reason:</u> Under 18 USC §3161(h)(1)(G) the 30 day period during which motions are "under advisement" is excludable.		
5/11/77-6/21/77	30	Non-excludable

**GOVERNMENT'S COMPUTATIONS OF TIME UNDER VARIOUS
NORTHERN DISTRICT PLANS.**

COMPUTATION OF TIME - Various N.D. Plans

<u>Date</u>	<u>Days</u>	<u>Category</u>
<u>Reason:</u> Delay before trial date.		
<u>Totals</u> ³		
	224	Excludable
	116	Non-excludable

1. During the period of January through March, 1977, Judge Munson was presiding over a lengthy criminal trial, United States v. Morton Norwich, et al., 75-CR-114. Trial was held on January 5, 13, 14, 17, 18, 19, 20, 25, 26, 27, 28 and 31; February 1, 2, 3, 4, 7, 8, 9, 11, 15, 17, 18, 22, 23, and 24; March 1, 7, 8, 9, 10, 11, 14, 15, 16 and 18, 1977. The Clerk calculated and stated that the entire period March 1, 1977 to May 3, 1977 is excluded under 18 U.S.C. §3161(h) (8) (A) because of a continuance in the interests of justice (J A 145).

2. On May 3, 1977, defense counsel requested a continuance of this case until after the completion of the pending appeal in the companion case 74-CR-144. The Government strenuously opposed this defense motion which Judge Munson denied.

3. The total time between July 1, 1976 and November 29, 1976, the first trial date for Masciarelli and English, is 152 days. Since 63 days are excludable from this period, Masciarelli and English received a trial within 89 days from July 1, 1976. This complies with Rule 5 of the 1976 Plan (Gov A 23).

On November 30, 1976 Masciarelli and English specifically waived any rights to a retrial within 60 days under Rule 5(b) of the 1976 Plan (Tr. November 30, 1976, pp. 3, 4). Appellants do not mention this on page 9 of the Joint Brief but do refer to the waiver on page 12.

The total time between July 1, 1976 and June 21, 1977, the second trial date for Masciarelli and English, is 356 days. Since 238 days are excludable from this period, Masciarelli and English actually went to trial within 118 days from July 1, 1976. This complies with Rule 5 of the 1976 Plan (Gov A 23).

4. McGrath's trial was scheduled to commence on April 27, 1977 (mistrial). The trial actually began on May 11, 1977. Since McGrath's new counsel requested a 35 day continuance on November 15, 1976 and McGrath proceeded to trial before Masciarelli and English, the delay for McGrath is obviously less than the delay for Masciarelli and English. For this reason we have not calculated the actual number of days of delay for McGrath.

TRANSCRIPT OF HEARING Held January 3, 1977.

BY MR. SHANAHAN: I believe the testimony should commence as March 6, 1974 at the time these recordings were initially made pursuant to the order and the protection aspect of subsection 8a deals with whether or not alterations could have occurred in any time they were in custody. I think we should be starting --it seems a practical way of doing it, we would call Mr. Hazelwood and start from that sixth day of March, it seems limiting us to that date of delivery--determination is really a waste of time.

BY THE COURT: All right. I have not done so, however, I suspect I should have--there have been very many motions for suppression in this case, not all of them dealing with the same thing we are dealing with today and I read the United States against Gigante, I'm sure all of us are familiar with it, there wasn't any time that case wasn't less than eight months, as I recall some of them over a year before the cases were--the tapes were sealed and the Government made what the Court considered to be putting it kindly, erroneous arguments, if they are eventually sealed, then

TRANSCRIPT OF HEARING Held January 3, 1977.

it is okay--that didn't happen in this case and the motions that have been made in this case have been directed towards the failure to seal "immediately", and you can read into your affidavit things that I don't read into it. I'm going to give you, Mr. Scaccia, an opportunity to read the notes that Agent Hazelwood has turned over to you. In the meantime, I will renew my looks at the motion that was made here today because it seems to me we are getting a little far afield, particularly if the Government is going to produce other agents to talk about the other exhibits that have been marked here today, so with that in mind, I will be happy to hear anything else you have to say in a moment, but let's take a ten minute recess and let me take a look at your affidavit.

BY THE CLERK: Court stands in recess for ten minutes. (3:35 P.M.)

BY THE COURT: Court is in session. Mr. Avery, I've had an opportunity to read your Notice of Motion for Suppression Hearing and as I read it you asked for three things which seem to me to be interrelated and you can correct me if I am wrong, that the Evidentiary

Hearing will be held for the purpose of explaining and justifying the delay and submitting the original tapes to the Court for the purpose of sealing pursuant to the statute and suppressing the use of evidence or as evidence of the original tapes, and I would assume, that second request -- the first one having been acquiesced by the Government, the second request is based upon the outcome of the hearing, and therefore, dismissing the indictment based upon the outcome of the hearing, and it seems to me that the whole thrust of the motion is with regard to failure or alleged failure of the Government to seal these tapes within the purview of the statute, particularly, within the purview of the recent cases with regard to sealing.

BY MR. AVERY: If I could point out, Your Honor, if I may, the bases for the motion are set forth are very clearly on page 2, paragraph 3: I state for the basis of this motion is a, that the Government failed to comply with Provision 18a, is 2518a and one of the reasons that the Government failed to comply is set forth -- the reasons are set forth in subparagraph b, c, and d -- b, is the delay and c, is

that the tapes were utilized, the original tapes were utilized by the Government while they were in the Government's custody before sealing contrary to the expressed provision of the statute 8a which states that the recording of the contents of any wire or oral communication under this subdivision shall be in such a way as will protect the recording from editing or alteration.

The whole thrust is twofold: unexplained delaying in violation of Statute 2, that during the delay the tapes were utilized by the Government in such a way as would yield the potential of abuse spoken about in Gigante, the whole reason for expression of opinion by the Court of a potential for abuse in Gigante utilized the section, immediate control of the Court intended by the sealing process, but the thrust is twofold: there is unjustifiable delay and unwarranted and illegal delay and second; that during the period of the delay we felt there was such a use as would make it potentially if not actually damaging to the use of the tapes as evidentiary material. The Government's position is that there is no delay prior to the time the intercept order ends.

THE COURT: Well, we should continue with the hearing, however, I think that the hearing should be restricted to the basis for the hearing, which as I understand it, is the alleged unreasonable delay or lack of immediacy on the part of the Government in having the tapes sealed. I think all of the rest of the testimony as to whether or not these were tampered with can be gone into by your experts and can be gone into at the time of the trial. It seems to me they are going quite far afield in this hearing, so I assume Mr. Scaccia, you are not finished with or have not concluded your examination of

Mr. Haze add.

MR. SCACCIA: That is correct, Your Honor. I wish I could have been heard before any ruling was made; I would like to be heard on this matter.

THE COURT: Which gentleman?

MR. SCACCIA: I think it is terribly critical, Your Honor, we have known for some days before December 16th, or whatever the date was, that we discovered, I'll say on or about December 1 that there was some delay that was evident from the face of the outer containers of the boxes that were in the custody of the clerk, but it wasn't until December 1 that we discovered that contrary to your understanding there were in fact copies of an original recording and we also learned on that same date there had been a playing and replaying in Binghamton and duplicating in the Albany office of the F.B.I.; based upon that specific information was a reason we came to Your Honor and were given an opportunity to make motions, and we tried to include all of that in as discreet language as possible. In the motion papers we argued it at some length and I do feel the defendants would be prejudicially deprived of an important right if we were not permitted to explore the information that was only disclosed and released to the defense on or about December 1; the manner and method in which Judge Port's authorizing

orders were implemented by the Government we charge in a brief, fully divulging the playing and replaying is a violation of the Statute--absent of Court order we didn't know that there had been this playing and replaying and duplicates made of the tapes until on or about December 1 and we promptly brought it to the attention of the Court and made our motions.

THE COURT: Well, Mr. Scaccia, first of all, I do not know where you get the words "playing and replaying", I suspect that you would be upset as a prosecutor, unless the tapes were played, it would seem to me that somebody should listen to them and I suspect that if somebody did not listen to them and came in and asked for an indictment you would be sorely disturbed beyond what good tapes are, unless somebody listens to them: secondly, I don't think that that is the thrust of the motion in this instance. You came in to me and cited to me United States against Gigante which has to do with the immediacy of the sealing of these orders and, you know, all along I have thought the motions at this hearing were brought because Judge Port did not receive these tapes and seal them until several days after they were in the custody of the F.B.I. It seems to me the other two thrusts of the motions hinge on that. I agree that if these tapes were tampered with and so forth it should not

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be admissible here. However, I don't know if that is a part of this hearing and I think the hearing is to find out what was the custody? Was the Statute complied with with regard to the immediacy of filing or sealing by the Court and I think that this hearing should be limited to that. It may be, Mr. Scaccia, it wasn't until December 11, 1975 that you learned of that, my question on that line is; why?

MR. SCACCIA: Why what, sir?

THE COURT: Well, the indictment was not 1974, now--

MR. SCACCIA: (interrupting) I can answer that if I am given an opportunity to, Your Honor. I had argued it at length on December 16th and I am going to argue it again that from the time the Government made representation to all counsel in the grand jury room when this matter was first discussed with all counsel with respect to proposed stipulations as to custody and the like, the Government gave all counsel the discussion that they were simultaneous recordings and since Your Honor has ordered this hearing, we have taken the trouble to check very carefully with some of the other counsel who were in the room and I can now represent to the Court we can establish that, if need be, the short of it, the defense had been told that these were simultaneous recordings--

given that we didn't see any problem with simultaneous recordings, Your Honor, if one copy was arbitrarily marked duplicate original and it remained intact right up until the chain of custody until delivered to Judge Port, we didn't see any problem assuming custody would be established, however, December 1 we were inventorying the boxes, and in the course of that day, we learned for the first time these were simultaneous recordings, that they were copies, as a matter of fact, we were also told the numbers of reels of the copies exceeded the number of the reels of the originals that were sealed by the Court order, and therefore, it would not be a one to one correlation. We also learned from Agent Ross on that day there had been a playing and replaying of those tapes both in Binghamton and also revealed in addition to the playing and replaying, in his words, at Binghamton there had been a delivery of the tapes to Albany to F.B.I. headquarters where the playing again took place, and copying took place, all without Court order before the tapes were delivered to Judge Port in Auburn. With all that, Your Honor, as I read the Statute, continuous judicial security necessity of all phases not only including the application and the issuance of the order authorizing the interception, but all phases of the interception, i.e., the implementation even after the Federal

Court Judge issued the order is all to be under continuous judicial security necessity and it seems to me it is clear under the Statute if any playing or any copying of the tapes is to be done there is a simple procedure under the Statute. All they need do given the requirements of judicial security necessity is simply to play to the Court in the alternative either in the first instance to make simultaneous duplicated recordings, or it appears to be the case here where only one recording was made, again I bring it to the attention of the Court only one copy was made, applied for permission and application to the Court to make copies and it would be done under Court security and Court order and direction, that's the advice here. They have violated the Statute, the Statute provides the government a mechanism, a procedure to do it--simultaneous recordings or original recordings with copies, however in either event they must do so by leave of the Court, particularly when making copies, and, we are dealing with the integrity of the tapes, we are dealing with the confidential Court records. It is not only the issuance of the order, but also the implementation of the order and the storage of the product that must also be under continuous judicial security necessity.

THE COURT: All right, Mr. Scaccia. The questions that you are raising on retaping these things is

whether the integrity of the e tapes was preserved, but as I read your motion, and by the way, it goes a little towards that, the immediacy of sealing has to do with the integrity of those tapes because I guess Congress felt that an overseeing by the Court of the sealing of the tapes if done immediately would preserve their integrity. I think that the question as to the integrity of those tapes between the times they were actually transcribed and the time they were sealed can be questioned by experts or by questioning the agents who had custody and control of them, I'm not certain if that issue is before the Court today. If the Government and defense counsel want to have a full-fledged hearing, which in essence has to do with actually the trial and cross examination of all the witnesses, that is something else, but here we are talking about whether the tapes were sealed immediately within the purview of what the Second Circuit says is immediate or any other circuit and I frankly find it very difficult to see where we should inquire today into the entire integrity of those tapes because if we do that then I suspect we have to call in whatever telephone company did it, how they hooked them up, whether somebody could have interconnected, all the various ramifications that bear on the integrity of these tapes. I'm going to let you go as far as I can, but I'm not sure that we should

go as far as I have been allowing you to.

MR. SHANAHAN: I became involved in this and adopted the motion of Mr. Avery upon reading it and it is my understanding, particularly in regard to the issue of custody if we begin at the conclusion of that recording it is only a partial hearing; custody is something that occurred at the time that machine was set up. I anticipated that was the nature of this hearing, and that is why the expert was called here today--

THE COURT: (interrupting) All things are conceivable, what I'm saying I suspect is that there are certain matters that are reserved to the trial, there are certain matters that are susceptible to cross examination certain matters reserved to this type of a hearing and, as I read the motion papers, I'm afraid I'm disagreeing with defense counsel on this hearing. Now, I'm not saying on the trial these tapes can not be attacked for any reason necessary.

MR. SCACCIA: Of course, this is done for the purpose of expediency.

MR. SHANAHAN: The suppression hearing could conceivably last longer than this hearing.

Your Honor, I'm sorry I don't have the original copy any more.

THE COURT: Well, given the right of the public

not to have their privacy invaded and given the right of the defense to have a suppression hearing and given the right of the defense to utilize the Statute whatever way it seems fit, we must also understand that the Statute protecting the public's rights not to have its privacy invaded is merely talked about, as I see it, the protection from both sides, the public and the defense and the Government and the right to have evidence which is untampered with, and the Court must oversee it and seal it within a reasonable -- or immediately, not within a reasonable time. The question here is we have admitted it was not a long term delay, I think that what we should do at this time is to continue with this hearing and I'll let you go as far as I can, but if the Government wishes to object there is going to come a time I am going to have to sustain the objection. I can see what you are talking about and I understand what you are talking about, but a lot of what you are talking about is what you are able or going to be able to develop on the trial of the case assuming that the tapes are not suppressed at this time.

MR. SCACCIA: That is just the point, Your Honor, if we have the violation of the Statute which authorizes these interceptions and we are entitled to suppress them in the interest of justice of assertion of that right, aren't we required to make a motion and develop the evidence

TRANSCRIPT OF HEARING Held January 3, 1977.

with respect to claimed violation of the Statute now so that if the Court is satisfied with that the Statute in point of law be violated, then we can have our suppression in advance of trial and both sides will be properly guided in the course of separation of the trial, if one is required, given the Court's decision on suppression we felt that it may amount to dismissal of the indictment.

THE COURT: Surely you are entitled to that.

The Court is always entitled to the parametering in which this hearing is being held; parameters were set forth in Mr. Avery's motion which was given to the Court on or about December 1976. And Mr. Chalenski, I don't assume you have anything to say, or do you?

MR. CHALENSKI: Your Honor, I have already made denials and I'll stand on those I made at a prior time and not add anything else.

THE COURT: Well, I would ask you at this time, Mr. Scaccia, to ask Mr. Hazelwood to resume the stand. Mr. Scaccia, have you had an opportunity to review the notes that you had marked as Exhibits B and C?

MR. SCACCIA: Yes, Your Honor.

THE COURT: Would you like to continue your cross-examination?

MR. SCACCIA: If it please the Court.

THE COURT: With the Court's permission.

LETTER FROM ARTHUR A. CHALENSKI, JR., ASSISTANT U.S.
ATTORNEY TO CHARLES AVERY, ESQ., dated 5-5-76.

CR74-0947/AAC

May 5, 1976

Charles Avery, Esq.
Attorney for Jon N. English
Post Office Box 684
188 Genesee Street
Auburn, New York 13021

Re: United States v. Cannone, et al.
Criminal No. 74-CR-142

Dear Mr. Avery:

Enclosed please find a copy of the papers identified in the attached list. Referring to our conversation of May 4, 1976, you reviewed the files of the District Court Clerk relating to wiretaps in the above-captioned case, and advised that you desire this office to provide you with copies of the documents set forth in the attached list. The list should set forth the documents which you described to Mrs. Viola Myers of this office on May 4, 1976. If the list is not correct, please let me know.

By copy of this letter, I am forwarding a copy of each enclosure to each of the attorneys representing the defendants in the above-captioned case as well as the attorneys representing the defendants in the companion case of United States v. Masciarelli, 74-CR-144.

Among the documents which you requested are the court orders and accompanying applications relating to intercepted wire communications which will be sought to be introduced in evidence in the above-identified case and in the companion case of United States v. Masciarelli, 74-CR-144. Accordingly, furnishing the enclosed documents to you as well as to the attorneys copied on this letter shall constitute compliance with Title 18, United States Code, Section 2518(9) which requires that such documents be furnished to defense counsel ten days prior to trial.

LETTER FROM ARTHUR A. CHALENSKI, JR., ASSISTANT U.S.
ATTORNEY TO CHARLES AVERY, ESQ., dated 5-5-76.

Charles Avery, Esq.

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May 5, 1976

If you have any questions or comments, please let
me know.

Very truly yours,

JAMES M. SULLIVAN, JR.
United States Attorney

AAC:kr
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Assistant U. S. Attorney

cc/w/encls.

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**LETTER FROM ARTHUR A. CHALENSKI, JR., ASSISTANT U.S.
ATTORNEY TO CHARLES AVERY, ESQ., dated 5-5-76.**

MISC. NO. MP-15 - AFFIDAVIT of Robert R. Hazelwood sworn to
on 3/6/74

APPLICATION of Eugene Welch sworn to on
3/6/74

ORDER AUTHORIZING USE OF A PEN REGISTER
dated 3/6/74

ORDER AUTHORIZING INTERCEPTIONS OF WIRE
COMMUNICATIONS dated 3/6/74

FIFTH DAY REPORT of Eugene Welch, dated
3/11/74

TENTH DAY REPORT of Eugene Welch, dated
3/16/74

MISC. NO. MP-16 - AFFIDAVIT of Robert R. Hazelwood sworn to
on 4/11/74

APPLICATION of Eugene Welch sworn to on
4/11/74

ORDER AUTHORIZING USE OF A PEN REGISTER
dated 4/11/74

ORDER AUTHORIZING INTERCEPTIONS OF WIRE
COMMUNICATIONS dated 4/11/74

FIFTH DAY REPORT of Eugene Welch, dated
4/16/74

TENTH DAY REPORT of Eugene Welch, dated
4/21/74

MISC. NO. MP-17 - AFFIDAVIT of Robert R. Hazelwood sworn to
on 5/3/74

APPLICATION of Eugene Welch sworn to on
5/3/74

ORDER AUTHORIZING USE OF A PEN REGISTER
dated 5/3/74

ORDER AUTHORIZING INTERCEPTIONS OF WIRE
COMMUNICATIONS dated 5/3/74

FIFTH DAY REPORT of Eugene Welch, dated
5/6/74

*LETTER-FROM ARTHUR A. CHALENSKI, JR., ASSISTANT U.S.
ATTORNEY TO CHARLES AVERY, ESQ., dated 5-5-76.*

MISC. NO. MP-17 - TENTH DAY REPORT of Eugene Welch, dated
5/13/74

MP-15, MP-16, MP-17, INVENTORY, signed by HONORABLE EDMUND PORT
on June 17, 1974.

Affidavit in Support of Search Warrants of Robert R. Hazelwood
sworn to on June 17, 1974.